Supreme Court, U.S.
FILED
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN R. ROACH,
CRIMINAL DISTRICT ATTORNEY,
COLLIN COUNTY, TEXAS,
Petitioner,

v.

VICTOR HUGO SALDANO,
Respondent

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
to the Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED – Capital case.

1. **Does a district attorney have an interest relating to the transaction that is the subject of the federal habeas proceedings such as to permit his intervention as a matter of right, alongside counsel for a state prisoner's custodian, where he has primary authority for initiating and prosecuting criminal cases, he defends them on direct appeal and in state habeas proceedings, and his conduct in prosecuting the case is at issue?**

2. **Is a district attorney's interest in a criminal case adequately represented by counsel for a prisoner's custodian on federal habeas review where (a) this Court deferred ruling on counsel's initial confession of error and remanded to the state appellate court, (b) counsel abandoned defenses continuously asserted by the district attorney, (c) the state appellate court repeatedly applied procedural default to bar relief, (d) no court has ever determined whether any error was harmless, and (e) counsel acquiesced to the defendant bypassing both further appeal to this Court and state habeas proceedings?**

3. **Are the criteria for intervention misconstrued by (a) imposition of a "direct, substantial, and legally protectable interest" requirement that denies the very person responsible for prosecuting an underlying action a sufficient interest and (b) determining the adequacy of representation without regard for the**

propriety of the waiver of both procedural default and harmless error that triggered the request for intervention? *See* FED.R.CIV.P. 24 (a) (2&4).

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PETITION FOR WRIT OF CERTIORARI

This case presents important questions of statutory interpretation regarding intervention as a matter of right. The Court must clarify the *interest* and *inadequate representation* requirements of intervention. Also, as the Court observed in *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991), prisoners must be prevented from improperly exploiting the federal justice system. Accordingly, the District Attorney prays that the Fifth Circuit entered on March 23, 2004.

OPINIONS BELOW

On direct appeal, the Texas Court of Criminal Appeals affirmed the trial court's judgment. *Saldano v. State*, Slip Op. No. 72,556 (Tex.Crim.App. Sept. 15, 1999) (not designated for publication). But, on Saldano's petition for writ of certiorari, this Court vacated the opinion of the state appellate court and remanded the case in light of the Texas Attorney General's confession of error. *Saldano v. Texas*, 530 U.S. 1212 (2000). The Texas Court of Criminal Appeals again affirmed. *Saldano v. State*, 70 S.W.3d 873 (Tex.Crim.App. 2002); *see also* Appendix C.

On collateral attack in federal court, the district court ruled that the District Attorney's motion to intervene as a matter of right was a nonjusticable political question. But, on the District Attorney's appeal, the United States Court of Appeals for the Fifth Circuit reversed and remanded for a ruling on the merits. *Saldano v. O'Connell*, 322 F.3d 365 (5th Cir. 2003); *see also* Appendix A. The district court denied the application for intervention and granted relief. *Saldano v. Cockrell*, 267 F.Supp.2d 635 (E.D. Tex. 2003). On the District Attorney's appeal, the United States Court of Appeals for the Fifth Circuit affirmed in

part and dismissed in part. *Saldano v. Roach*, 363 F.3d 545 (5th Cir. 2004); *see also* Appendix A.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit affirmed in a published opinion the district court's order denying the District Attorney's motion to intervene as a matter of right on March 23, 2004. *See* Appendix C. Thus, the State's petition for writ of certiorari is timely filed on or before June 21, 2004. SUP. CT. R. 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a). *See Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972) (granting certiorari after court of appeals affirmed district court's order denying intervention); *Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519 (1947) (allowing appeal from denial of intervention as a matter of right).

Victor Hugo Saldano filed a petition for writ of habeas corpus by virtue of which the district court obtained jurisdiction of this case. *See* 28 U.S.C. §§ 2241 and 2254.

STATUTORY PROVISION INVOLVED

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's

interest is adequately represented by existing parties.

FED.R.CIV.P. 24(a)(2).

STATEMENT OF THE CASE

I. Facts of the crime

Saldano and an accomplice randomly kidnapped Paul King outside a Plano, Texas, grocery store on November 20, 1995. 14 RR 38-46, 49, 51-53, 55-56. They forced King into his own car and, at gunpoint, drove him into the country. 14 RR 51-53, 55-56, 109. On a secluded road, Saldano shot King five times, stole his watch and wallet, and left his body. 14 RR 118-20, 233; 16 RR 544; 17 RR 653, 684, 715, 719, 814-16.

During the punishment stage of trial, the State elicited testimony in support of Saldano's future dangerousness, which demonstrated "the random nature and needless cruelty of the crime, Saldano's lack of remorse and his attempted aggravated robbery five days before the murder." *See Saldano*, 267 F.Supp.2d at 638 n.1.

II. Procedural history

A. Trial

The Collin County Criminal District Attorney obtained a capital murder indictment against Victor Hugo Saldano and prosecuted the case against him at trial. 1 CR 5.

In July 1996, a jury convicted Saldano of capital murder, and in accordance with the jury's findings on the special issues, the trial court sentenced Saldano to death. *See* 1 CR 128-33. One of the special issues in Texas requires

the jury to consider the defendant's future dangerousness.[1] *See Saldano*, 70 S.W.3d at 884 n.43.

During the punishment proceedings, the prosecution elicited testimony from Dr. Walter Quijano, a clinical psychologist, about statistical identifying markers that help experts determine whether there is a probability that a defendant will present a future threat. *See id.* at 885. The witness testified that blacks and Hispanics are overrepresented in the criminal justice system but that race itself may not explain the overrepresentation and that Saldano, a native of Argentina, would be considered Hispanic. *Id.* Saldano did not object to this testimony; instead, he met it through cross-examination and through the presentation of the testimony of another clinical psychologist, Dr. James McCabe.[2] *Id.*

B. Direct appeal

On direct appeal, Saldano challenged for the first time the admissibility of Dr. Quijano's testimony. *Id.* at 886. Finding that the alleged error had not been preserved because Saldano failed to object at trial, the Texas Court of Criminal Appeals affirmed the trial court's judgment. *See Saldano*, No. 72,556 The District Attorney represented the State in both state courts.

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[1] The special issue inquires "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX.CODE CRIM.PROC.ANN. art. 37.071, § 2(b)(1) (Vernon 2003).

[2] The lower courts both recognized that Saldano elected to cross-examine the witness and present his own expert testimony rather than object to Dr. Quijano's testimony. *See Saldano*, 363 F.3d at 549; *Saldano*, 267 F.Supp.2d at 638. Further, the district court correctly observed that during closing argument, the prosecutor did not emphasize Saldano's race or ethnicity. *Saldano*, 267 F.Supp.2d at 638.

Saldano then filed a petition for writ of certiorari in this Court. His question for review was "Whether a defendant's race or ethnic background may ever be used as an aggravating circumstance in the punishment phase of a capital murder trial in which the State seeks the death penalty." *Saldano*, 70 S.W.3d at 875. In response to the petition, the Attorney General, through his Solicitor General, stepped in.[3] The Attorney General responded to the petition by confessing error on the ground that the prosecution's introduction of race as a factor in determining future dangerousness constituted a violation of Saldano's rights to equal protection and due process. *Id.* Although the District Attorney also tendered a brief in opposition, this Court returned it unfiled and denied the District Attorney leave to file a brief *amicus curiae*. *See id.* at 884-85 n.39. On June 5, 2000, the Court vacated the judgment of the Court of Criminal Appeals and remanded the case "for further consideration in light of the confession of error by the Solicitor General of Texas." *Id.* at 875.

On remand, the Court of Criminal Appeals asked the parties, and invited the Attorney General, to brief an additional issue "of the attorney general's authority to represent the State in certiorari proceedings in criminal cases in the Supreme Court of the United States." *See id.* at 876. The Texas State Prosecuting Attorney became actively involved in the case, and both he and the District Attorney filed briefs and shared oral argument. *Id.*

In its opinion, the Court of Criminal Appeals again affirmed the trial court's judgment. It held that the Texas Attorney General has limited access to the United States

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[3] In the scheme of Texas government, there is no office of Solicitor General that corresponds with the Solicitor General of the United States. The title of Solicitor General is bestowed on an assistant attorney general. *See Saldano*, 70 S.W.3d at 875 n.3.

Supreme Court on direct appeals of a criminal case.[4] *Id.* at 883. It also held unequivocally that Saldano had not preserved error: "After our independent examination of the claim, we hold that no complaint about Dr. Quijano's testimony is presented for appellate review because [Saldano] did not make an objection to the testimony as our law has always required." *Id.* at 891. Thus, the "confession of error in the Supreme Court is contrary to our state's procedural law for presenting a claim on appeal as well as the Supreme Court's enforcement of such procedural rule when it is presented with equal-protection claims." *Id.* Saldano did not file a petition for certiorari from this decision.

C. Federal habeas proceedings

Next, instead of directly appealing to this Court again and instead of pursuing state habeas relief, Saldano filed a petition for writ of habeas corpus in federal district court. *Saldano*, 363 F.3d at 550. The Director of the Texas Department of Criminal Justice, Institutional Division, represented by the Attorney General of Texas, responded by confessing error. *Id.* The confession of error was

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[4] Precisely, it held:

> The authority to represent the State in criminal cases in certiorari proceedings in the Supreme Court of the United States is in the district or county attorney who had the authority to prosecute the case in the courts of Texas, and the attorney general is authorized to provide assistance to such an attorney at the request of that attorney or when such an attorney appoints an assistant attorney general as an assistant prosecutor or attorney pro tem under section 402.028 of the [Texas] Government Code.

Saldano, 70 S.W.3d at 883.

inconsistent with the position taken by the District Attorney and the State Prosecuting Attorney in the state courts and disregarded the Texas Court of Criminal Appeals' opinions in this very case. *See Saldano*, 70 S.W.3d at 873.

The District Attorney, along with the State Prosecuting Attorney, sought and obtained *amicus curiae* status. Alone, the District Attorney also moved to intervene as a matter of right. But the district court denied the motion on grounds that the issue before it was a nonjusticiable political question.[5] *Saldano*, 363 F.3d at 550. The District Attorney appealed and the Fifth Court reversed the district court in an opinion issued on February 18, 2003. *Id.* The intermediate court also remanded the application for disposition on the merits. *Id.*

On June 12, 2003, the district court again denied the motion to intervene on the single ground that the District Attorney did not have a direct, substantial, and legally protectable interest. *Saldano*, 267 F.Supp.2d at 640-45. The District Attorney filed notice of appeal and a motion for a stay of execution of the district court's judgment. On July 18, 2003, the district court found the District Attorney's motion "well-taken" and granted a stay pending final determination of this appeal.

On March 23, 2004, after hearing oral arguments, the Fifth Circuit held that the district court properly denied the District Attorney's motion to intervene because "the District Attorney does not have a 'direct, substantial, and legally protectable interest' in these proceedings, and

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[5] With his application to intervene, the District Attorney submitted his "Intervenor's Answer." But on July 18, 2002, the clerk of the district court returned all copies of the answer and a copy of the application to intervene bearing a handwritten post-it note stating "Denied not filed." After this Court reversed and remanded following the District Attorney's original appeal, the District Attorney prepared another answer and filed it on March 31, 2003.

that any interest he does have is adequately represented by the Attorney General. . . ." *Saldano*, 363 F.3d at 556.[6] Thus, it continued, it lacked jurisdiction to review the district court's final judgment on the merits. *Id.*

SUMMARY OF THE ARGUMENT

Absent this Court's clarification of the scope of the *interest* and *inadequate representation* requirements of intervention as a matter of right, the federal courts will have been improperly exploited so as to substantially erode the important principles of comity, federalism, finality, and the orderly administration of justice.

ARGUMENT

I. Limitations on the scope of federal habeas

Federal habeas should not serve as a vehicle for evading direct review by this Court, especially if it is employed to render state law ineffective. The Court has advised that "fundamental fairness is the central concern of the writ of habeas corpus." *Strickland v. Washington*, 466 U.S. 668, 697 (1984). In obtaining this goal for the Great Writ, the Court has also taught that relief is sometimes unavailable because of the application of one or more guiding principles of federal habeas corpus. One such principle is to maintain the delicate balance between the courts of the nation's dual criminal justice systems:

> [Federal habeas corpus jurisdiction] should be exercised in the light of the relations existing, under our system of government, between the

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[6] Both federal courts below and the Attorney General acknowledged that the timeliness of the application for intervention was not at issue. *Saldano*, 363 F.3d at 550 n.5; *Saldano*, 267 F.Supp.2d at 640. Also, while the district court ruled that the District Attorney's interest would be impaired, the Fifth Circuit only observed that the "District Attorney will be affected, as a practical matter, by the district court's order." *Saldano*, 363 F.3d at 553; *Saldano*, 267 F.Supp.2d at 640.

> judicial tribunals of the Union and the States, and in recognition of the fact that the public good requires those relations to be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.

Rose v. Lundy, 455 U.S. 509, 515 (1982) (quoting *Ex parte Royall*, 117 U.S. 241, 251 (1886)). Comity and federalism, then, are principles serving to maintain both the rights of the Constitution and the delicate balance of relations between the States and the Union. *See, e.g., Dretke v. Haley*, No. 02-1824, Slip Op. at 1, 541 U.S. ___ (2004); *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) (observing that "the independent and adequate state ground" doctrine applied on federal habeas review is grounded upon the equitable considerations of federalism and comity). Another principle attaching to federal habeas is that of finality:

> Direct review is the principal avenue for challenging a conviction. "When the process of direct review—which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari—comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring constitutional rights are observed, is secondary and limited."

Brecht v. Abrahamson, 507 U.S. 619, 633 (1993) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). Yet another principle is safeguarding the orderly administration of justice: "this Court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power." *Francis v. Henderson*, 425 U.S. 536, 539 (1976).

In this case, Saldano has been permitted to achieve by way of federal habeas proceedings in the lower courts that which he did not accomplish on direct appeal to this Court. This Court's deference to the state appellate court on the original confession of error and the unequivocal and repeated declarations of the state's appellate court that procedural default bars relief have been disregarded, and no court has even had the opportunity to pass on whether any error was harmless or not. On federal habeas, Saldano has obtained relief with the passive compliance of the representative for his custodian. This is starkly at odds with the usual role of an advocate in our adversarial justice systems. The Attorney General has abandoned any reliance upon the application of the independent and adequate state ground doctrine, thereby undermining finality, comity, and federalism. As this Court has warned, without the independent and adequate state ground doctrine:

> a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its own laws.

Coleman v. Thompson, 501 U.S. 722, 730-31 (1991). Here, Saldano has snatched a windfall handed to him on a platter. He did not obtain relief from this Court on direct appeal—in fact, to cut out the District Attorney from representing the State on direct appeal, he deliberately leapfrogged to federal habeas where he knew the Attorney General would again confess error—and the state rule on procedural default has been rendered ineffective just as completely as if this Court had reversed the state judgment on direct review. *Id.* at 730. Bluntly, *Coleman* has been

offended: the relations between the state and federal judicial tribunals have been profoundly and detrimentally altered.

Absent the District Attorney obtaining the status as an intervenor as a matter of right, no recourse lies for this travesty of justice. But the District Attorney has a significantly protectable interest, and he may be inadequately represented by the Attorney General; thus, he should be permitted to intervene in this habeas proceeding.

II. The District Attorney has an interest relating to a transaction which is the subject of this habeas corpus action

The Rules of Civil Procedure require a potential intervenor to claim "an interest relating to the property or transaction which is the subject of the action. . . ." FED.R.CIV.P. 24(a)(2). According to this Court, the interest must be "a significantly protectable interest." *Donaldson v. United States*, 400 U.S. 517, 531 (1971). But as learned commentators have observed, the Court's definition "has not been a term of art in the law and there is sufficient room for disagreement about what it means so that the gloss on the rule is not likely to provide any more guidance than does the bare term interest used in Rule 24 itself." 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1908 at 270 (2d 1986).

The Fifth Circuit requires that the interest be "direct, substantial, [and] legally protectable" and "one which the substantive law recognizes as belonging to or being owned by the applicant." *Saldano*, 363 F.3d at 551 (underlining in original). Moreover, the intervenor must

be a real party in interest regarding his claim. *Id.*

When reviewing the "interest" requirement, both this Court and the Fifth Circuit apparently agree that it is the policy underlying the prerequisite that should guide the decision to grant intervention. *See, e.g., Donaldson*, 400 U.S. at 531 (policy considerations constrained the Court from finding the taxpayer's interest was of sufficient magnitude). Or, as the Fifth Circuit has specifically acknowledged, any interest of the intervenor should further the goal of "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994).

Here, the interest requirement has been misconstrued and misapplied by the Fifth Circuit. The District Attorney has a significantly protectable interest. In the state court, he initiated the criminal case against Saldano. He also prosecuted and defended the case in the state trial and appellate courts. As the District Attorney, he alone has the statutory duty to prosecute criminal cases in Collin County, Texas. Further, when the federal habeas proceedings are concluded, the District Attorney will once again have responsibility for concluding the state proceedings (whether seeking execution of the original sentence or retrying the punishment stage of trial). Indeed, without the District Attorney's participation in the underlying criminal case there would not be this civil case.

The District Attorney also has a sworn duty both as an attorney and as an elected public official to uphold both state and federal law. As an elected official he has a specific interest in maintaining the dignity and integrity of the dual legal systems and the relationship between them.

Further, the questions of law and fact are common to the federal and state proceedings, as the history of this case through the courts amply demonstrates. *See S.E.C. v.*

United States Realty and Improvement Co., 310 U.S. 434, 460 (1940) (recognizing common question of law between proceedings in support of interest requirement). The only issue before the federal courts in this civil habeas case is the same one—the propriety of an expert's punishment testimony—that was presented to this Court on direct appeal from the state courts in the criminal case. This testimony was elicited by the State represented by the District Attorney.. Thus, it is the District Attorney's own conduct that is at issue.

In the state courts, and in various attempts before the federal courts, the District Attorney has consistently asserted the defenses of procedural default and harmless error. Twice, the Texas Court of Criminal Appeals has agreed with the District Attorney and applied procedural default to bar relief and affirmed the judgment of the trial court. Accordingly, the District Attorney has an interest in the continuing validity of the Texas Court of Criminal Appeals opinion in this case—an opinion soundly based in state law.

As both the lower federal courts recognized, the District Attorney is affected, as a practical matter, by the district court's order. *See Saldano*, 363 F.3d at 553; *Saldano*, 267 F.Supp.2d at 640. Plainly, the District Attorney is at a disadvantage in protecting any interest he has. After the Texas Court of Criminal Appeals' opinion on remand from this Court, he has been denied the opportunity to defend Saldano's punishment on direct appeal before this Court and the chance to defend it in state habeas proceedings. Also, absent his intervention in these federal proceedings, he cannot meaningfully assert the defenses of procedural default or harmless error, which have been abandoned by the Attorney General. He must merely observe while Saldano is permitted to employ the lower federal courts to achieve what he could not accomplish on direct appeal before this Court. Finally, to comply with the district

court's order, the District Attorney must either retry the punishment stage or forfeit a death sentence in this case. Practically, then, the District Attorney has been effectively, albeit temporarily, eliminated from the legal proceedings so that he cannot defend the conviction and punishment he obtained for his community and he cannot meaningfully protect the law against abuse.

The State's interest, if broader than the District Attorney's and the Court of Criminal Appeals' interests alone, as the Fifth Circuit has stated, *see Saldano*, 363 F.3d at 55 n.12, must also be broader than the interest of the Attorney General alone. Indeed, since they all have a duty to see justice done and multiple members of the judicial branch of state government believe justice is done by applying procedural default to bar relief, the more just result would seem to be contrary to the position taken by the Attorney General, a single member of the executive branch of state government.

Moreover, to recognize that the District Attorney, the Attorney General, and the Texas Court of Criminal Appeals all have a common duty, i.e., "to see that justice is done," also recognizes that each has a common interest. Such a shared interest, and one that is initially vested in the District Attorney and returns to the District Attorney after federal proceedings, should therefore suffice to support the District Attorney's intervention as a matter of right.

In sum, the District Attorney is charged with important public duties in every criminal case arising in his jurisdiction. He has a discernable, continuing, and "significantly protectable interest" in defending the conviction and punishment he has obtained as a result of performing his sworn duty to his community. He also has an overriding interest in ensuring that state and federal law, substantive and procedural, is fully recognized and

properly employed during legal proceedings. Holding that he has a significantly protectable interest also fulfills the underlying policy of the interest requirement to dispose of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.

III. The District Attorney's interest is not adequately represented by the Texas Attorney General

The intervention statute also requires that the existing parties not adequately represent the potential intervenor's interest. *See* FED.R.CIV.P. 24(a)(2). This criterion is fulfilled if the potential intervenor "shows that the representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich*, 404 U.S. at 538 n.10.

If the interest of the absentee is not represented at all, or if all existing parties are adverse to him, then he is not adequately represented. 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1909 at 318 (2d 1986). In fact, "the easiest case is that in which the absentee has an interest that may, as a practical mater, be harmed by disposition of the action and his interest is not represented at all." *Id.* at 319. "Almost as easy to resolve are the cases in which the party who may, in some senses, represent the absentee also is adverse to the absentee. The absentee cannot be required to look for adequate representation to one who is his opponent. . . ." *Id.* at 319-21.

When the public interest is represented by an arm of the government, a substantial showing of inadequate representation is required; however, even if a governmental representative is performing his duties, a potential intervenor may have a valid complaint about the performance of his lawyer. *See Trbovich*, 404 U.S. at 539. Thus, in *Trbovich*, the Court permitted a union member who filed the underlying complaint with the Secretary of

Labor to intervene in a suit initiated by the Secretary to set aside an election of union officers. "Such a complaint, filed by the member who initiated the entire enforcement proceeding, should be regarded as sufficient to warrant relief in the form of intervention under Rule 24(a)(2)." *Id.* at 539. The courts have also permitted intervention where a public official has a public duty to uphold and prevent abuse of the law. *See, e.g., United States Realty and Improvement Co.*, 310 U.S. at 460 (permitting government to intervene because of interest in "maintenance of its statutory authority and the performance of its public duties"); *S.E.C. v. Chestman*, 861 F.2d 49, 50 (2d Cir. 1988) (dismissing interlocutory appeal where U.S. attorney granted permissive intervention to prevent employment of civil process to accomplish what could not be achieved otherwise in a criminal proceeding); *Board of Governors of the Federal Reserve System v. Pharaon*, 140 F.R.D. 634 (S.D.N.Y. 1991) (permitting district attorney to intervene so as to head off interference with grand jury proceedings) (and cases cited therein).

That the District Attorney's interest may be inadequately represented is demonstrated by no less than four circumstances: this Court's deference to the state court; the state court's re-application of state procedural default law to bar relief; the absence of any harmless error analysis; and the Attorney General's acquiescence to the prisoner's manipulation of the nation's criminal justice systems. These circumstances have not been given the individual weight they deserve and, when considered, have been reviewed in isolation instead of in their totality.

A. The Attorney General's confession of error has not been accepted as dispositive by this Court

Although on direct appeal the Attorney General confessed error before this Court, the Court did not reach

the issue. Rather, the Court vacated the Texas Court of Criminal Appeals' judgment and remanded the case in light of the confession of error. Thus, despite the fact that the Court could have decided the merits of the confession of error, the Court demonstrated deference to the state court—furthering principles of comity and federalism.

The significance of this Court's deference has not been acknowledged by the Attorney General. The lower federal courts have not adequately considered it either. In fact, no federal court has yet determined whether the Attorney General's confession of error *in the face of the state judicial branch's invocation of the affirmative defense of procedural default* furthers the goal of justice. The meaning of this Court's abstention has been disregarded.

B. The state appellate court has repeatedly and unequivocally applied procedural default to bar relief

The Texas Court of Criminal Appeals, as the state's highest criminal appellate court, has twice issued opinions in this case holding that Saldano failed to preserve his claim for review. The Texas court applied well-established state law that has been routinely accepted by the federal courts. *See, e.g., Fisher v. Texas*, 169 F.3d 295, 300 (5th Cir. 1999); *Amos v. Scott*, 61 F.3d 333, 342 (5th Cir.) ("the TCCA strictly or regularly enforces the contemporaneous objection rule"), *cert. denied*, 516 U.S. 1005 (1995). This Court has also recognized that "[a] State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997).

Yet, in this case, the Attorney General gave the state court opinions no weight before the federal courts. This is contrary to his regular practice of asserting that Texas's interpretation of its own law is entitled to

deference by the federal courts. *See, e.g., Weeks v. Scott*, 55 F.3d 1059, 1063 (5th Cir. 1995); *Moreno v. Estelle*, 717 F.2d 171, 179 (5th Cir. 1986), *cert. denied*, 466 U.S. 975 (1984); *Gabel v. McCotter*, 803 F.2d 814 (5th Cir. 1986), *cert. denied*, 482 U.S. 929 (1987). He has disregarded the Court of Criminal Appeals' repeated opinions as if they simply did not exist.

The District Attorney must perform his duties under both state and federal law. Primarily, however, he functions under state law, which usually applies federal constitutional law. The Attorney General's dismissal of state law in making his confession of error demonstrates that he inadequately represents the interests of the District Attorney.

C. No court has yet had the opportunity to determine whether the elicitation of the improper testimony was harmless error

The Court has instructed us that the harmless error doctrine "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Rose v. Clark*, 478 U.S. 570, 577 (1986) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)). But, in this case, no state or federal court has had the opportunity to determine whether the error that is the basis of the Attorney General's confession is harmless. The effect of the error on the jury and its verdict at the punishment stage has never been evaluated by a judicial tribunal.

A harmless error analysis should have been conducted. In Texas, if an appellate court finds error, it must perform a harmless error analysis. *See Johnson v. State*, 43 S.W.3d 1, 4 (Tex.Crim.App. 2001); *Ovalle v. State*, 13 S.W.3d 774, 787 (Tex.Crim.App. 2000). Also, this Court has held that the improper admission of evidence at the punishment stage of a capital case can be harmless error. *See Satterwhite v. Texas*, 486 U.S. 249 (1988) (improper admission of psychiatric testimony). Further, the Court has suggested a "fresh look" approach when a party fails to argue that a claim has not been exhausted. *See Granberry v. Greer*, 481 U.S. 129, 134 (1987). Without any court determining whether the error in this case was harmless, the criminal process has been short-circuited. Public esteem for the criminal justice system is undermined.

D. Granting the District Attorney intervention does not fling open the door to every district attorney seeking to enter federal habeas proceedings

Allowing intervention in this case does not serve as an invitation to all district attorneys to intervene in federal habeas proceedings as a result of initiating, prosecuting, and defending the underlying cases. At a minimum, three factors serve to separate this case from other federal habeas cases. First, on direct appeal and in the face of the Attorney General's confession of error, this Court deferred to the state courts. Second, the highest state criminal appellate court has twice held on the District Attorney's assertions that procedural default applies to bar relief. Third, the State's usual representative has both ignored the unequivocal opinions of his state's highest criminal appellate court and acquiesced to the prisoner's manipulation of the legal system to obtain relief. Requiring any factor alone would restrict access, but requiring all of them together provides a lofty hurdle that

must be jumped by any district attorney seeking to intervene in federal habeas proceedings.

Efficiency and due process have not been served in this case. To the contrary, both have been substantially eroded, albeit unintentionally, by the lower courts' interpretations of intervention law. Further, their opinions establish precedent that will only further undermine the statutory role of intervention as a matter of right.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

Appendix A

Opinion of the United States Court of Appeals for the Fifth Circuit (March 23, 2004)

VICTOR HUGO SALDANO, Petitioner - Appellee, DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, Respondent - Appellee v. JOHN R ROACH, District Attorney of Collin County, Texas Movant, Plaintiff - Appellant

No. 03-40905

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

363 F.3d 545; 2004 U.S. App. LEXIS 5424

March 23, 2004, Filed

COUNSEL: For JOHN R ROACH, District Attorney of Collin County, Texas, Movant - Appellant: John Anthony Stride, District Attorney's Office for the County of Collin, McKinney, TX.

For VICTOR HUGO SALDANO, Petitioner - Appellee: Stanley G Schneider, Schneider & McKinney, Houston, TX.

For DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL

INSTITUTIONS DIVISION, Respondent - Appellee: Melanie P Sarwal, Assistant Solicitor General, Matthew F Stowe, Office of the Attorney General for the State of Texas, Austin, TX.

JUDGES: Before KING, Chief Judge, and SMITH and DENNIS, Circuit Judges.

OPINIONBY: KING

OPINION: KING, Chief Judge:

Victor Hugo Saldano was convicted of a capital offense and sentenced to death. Saldano subsequently filed a petition for writ of habeas corpus in federal court challenging his sentence. John R. Roach, the District Attorney of Collin County, Texas, appeals the district court's denial of his application to intervene as of right in Saldano's habeas corpus suit. For the following reasons, we affirm in part and dismiss in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1996, a Texas jury convicted Saldano of capital murder. During the punishment phase of Saldano's trial, the Collin County District Attorney ("District Attorney") called Dr. Walter Quijano, a psychologist, to testify as an expert witness. Dr. Quijano provided the jury with a list of twenty-four unweighted factors that he advised the jury to use in evaluating Saldano's future dangerousness. One of the factors was race. As to this factor, Dr. Quijano stated that Saldano was Hispanic, pointed out that Hispanics were over-represented in the Texas prison system, and

opined that there was a correlation between race and ethnicity and future dangerousness. During closing arguments, the District Attorney reminded the jury to consider the twenty-four factors laid out by Dr. Quijano when assessing Saldano's future dangerousness. Saldano did not object either to Dr. Quijano's testimony or to the District Attorney's reference to it during his closing argument; instead, he met Dr. Quijano's testimony through cross-examination and the presentation of a rebuttal witness.

After hearing all the evidence, the jury found that there was a probability that Saldano would commit criminal acts of violence that would constitute a continuing threat to society. In addition, the jury found insufficient mitigating circumstances to warrant life imprisonment rather than the death penalty. Consequently, the trial judge sentenced Saldano to death.

Saldano appealed directly to the Texas Court of Criminal Appeals, claiming that he had been denied due process of law because his race and ethnicity were improperly used to support a finding of future dangerousness during the punishment phase of his trial. The District Attorney argued that, because Saldano did not object to Dr. Quijano's testimony, Saldano's claim was procedurally barred by Texas's contemporaneous objection rule. The Court of Criminal Appeals affirmed Saldano's conviction and sentence, after finding that Saldano's claim was, indeed, procedurally barred.

The United States Supreme Court granted certiorari. Before the Supreme Court, the Attorney General

of the State of Texas assumed representation of the State.[1] The Attorney General confessed error in Saldano's sentencing and declined to raise Saldano's procedural default as a defense. The Supreme Court vacated the judgment against Saldano and "remanded to the Court of Criminal Appeals of Texas for further consideration in light of the confession of error." *Saldano v. Texas, 530 U.S. 1212, 1212, 147 L. Ed. 2d 246, 120 S. Ct. 2214 (2000).*[2]

On remand, the State Prosecuting Attorney,[3] with the District Attorney's help, represented the State before

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[1] The District Attorney sought leave to file a brief with the Supreme Court defending the judgment of the Court of Criminal Appeals, but the Supreme Court denied this request.

[2] Following the Supreme Court's ruling in Saldano, four other state inmates, each of whom had been sentenced to death as a result of punishment-phase hearings in which Dr. Quijano gave substantially similar testimony, petitioned for federal writs of habeas corpus. The Attorney General confessed error in each case and, in each, the federal court vacated the death sentence and granted a new sentencing hearing. See Alba v. Johnson, 232 F.3d 208 (5th Cir. 2000) (unpublished opinion); Broxton v. Johnson, 2001 U.S. Dist. LEXIS 25715, No. H-00-CV-1034 (S.D. Tex. Mar 28, 2001) (unpublished opinion); Blue v. Johnson, No. H-99-0350 (S.D. Tex. Oct. 2, 2000) (unpublished opinion); Garcia v. Johnson, No. 99-CV-00134 (E.D. Tex. Sept. 7, 2000) (unpublished opinion).

[3] The State Prosecuting Attorney has primary authority for representing the State before the Texas Court of Criminal Appeals, but a district attorney may assist the State Prosecuting Attorney. Saldano v. State, 70 S.W.3d 873, 876-77 (Tex. Crim. App. 2002) (en banc) (citing TEX. GOV'T CODE ANN. § 42.001(a) for the authority of the State Prosecuting Attorney); TEX. GOV'T CODE ANN. § 42.005(b). Article 2.01 of the TEXAS CODE OF CRIMINAL PROCEDURE outlines the scope of authority of a district attorney.

the Court of Criminal Appeals. The Attorney General submitted a brief as amicus curiae. Once again, the Court of Criminal Appeals ruled that Saldano's claim was procedurally barred. *Saldano v. State, 70 S.W.3d 873, 891 (Tex. Crim. App. 2002)* (en banc).

Saldano subsequently petitioned the United States District Court for the Eastern District of Texas for a writ of habeas corpus. The Attorney General--representing Doug Dretke, in his official capacity as Director of the Texas Department of Criminal Justice, Institutional Division--confessed error and waived Saldano's procedural default. The District Attorney filed an application to intervene as of right to oppose Saldano's petition on procedural-default and harmless-error grounds. The district court held that the political-question doctrine prevented it from considering the merits of the District Attorney's application for intervention.[4]

The District Attorney appealed. In *Saldano v. O'Connell, 322 F.3d 365, 371 (5th Cir. 2003)*, we held that the district court erred in finding that the District Attorney's application for intervention presented it with a non-justiciable political question. Therefore, we reversed the district court's order and remanded the District Attorney's application to the district court for disposition on the merits. *Id.*

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[4] The district court did, however, allow the District Attorney to file a brief as an amicus curiae.

On remand, the district court denied the District Attorney's application for intervention and granted Saldano's petition for a writ of habeas corpus. *Saldano v. Cockrell, 267 F. Supp. 2d 635 (E.D. Tex. 2003).* The District Attorney appeals both the order denying his application for intervention and the judgment granting Saldano's petition for a writ of habeas corpus. Director Dretke did not appeal the district court's judgment, but he did file a brief in opposition to the District Attorney's appeal.

II. INTERVENTION

A. Standard of Review

This court reviews de novo a district court's decision to deny an application for intervention under *Rule 24(a)(2) of the Federal Rules of Civil Procedure. Sierra Club v. Espy, 18 F.3d 1202, 1205 (5th Cir. 1994);* cf. 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 24.24[2][b], at 24-94 to 24-95 (3d ed. 2003) (describing circuit split).[5]

B. Intervention as of Right

Intervention as of right under *Rule 24(a)(2)* is proper when:

> (1) the motion to intervene is timely; (2) the potential intervener asserts an interest that is related to the property or transaction that forms the basis of the controversy in the case

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[5] A different standard of review applies to the district court's decision regarding the timeliness of the potential intervenor's application, see *Espy, 18 F.3d at 1205 n.2,* but timeliness is not at issue here, since all parties agree that the District Attorney's application was timely.

> into which she seeks to intervene; (3) the disposition of that case may impair or impede the potential intervener's ability to protect her interest; and (4) the existing parties do not adequately represent the potential intervener's interest.

Doe v. Glickman, 256 F.3d 371, 375 (5th Cir. 2001). The District Attorney claims that he meets all four of *Rule 24(a)(2)*'s requirements. The district court, however, ruled that the District Attorney did not meet the second requirement for intervention because he had failed to "establish that his direct, substantial, legally protectable interests [would] be impaired or impeded by the disposition of the case in his absence as a party." *Saldano, 267 F. Supp. 2d at 641.* We agree.

To meet the second requirement for *Rule 24(a)(2)* intervention, a potential intervenor must demonstrate that he has an interest that is related to the property or transaction that forms the basis of the controversy. *Doe, 256 F.3d at 375.* Not any interest, however, is sufficient; the interest must be "direct, substantial, [and] legally protectable." *Id. at 379* (alteration in original) (internal quotation marks omitted). We have explained that "the interest [must] be one which the substantive law recognizes as belonging to or being owned by the applicant." *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 464 (5th Cir. 1984)* (en banc). In addition, the intervenor should be the real party in interest regarding his claim. Id.

In this suit against Director Dretke, the real party in interest is the State of Texas. See *Diamond v. Charles, 476 U.S. 54, 57 n.2, 90 L. Ed. 2d 48, 106 S. Ct. 1697 (1986)* ("A suit against a state officer in his official capacity is, of course, a suit against the State."). And, although the District Attorney claims to have the authority to act as the State's representative in this case, state law provides otherwise. Under Texas law, a district attorney's duties and responsibilities are defined by statute. *State v. Allen, 32 Tex. 273, 275 (1869).* Texas law does not grant district attorneys the authority to represent either state officials, such as Director Dretke, or the State in a federal habeas corpus proceeding. See *TEX. CODE CRIM. PROC. ANN. art. 2.01* (Vernon Supp. 2004) (outlining the duties of district attorneys).[6] Instead, as the District Attorney concedes, Texas law gives the Attorney General the authority to represent Director Dretke and the State in suits such as this. See *Sierra Club v. City of San Antonio, 115 F.3d 311, 314 (5th Cir. 1997)* ("Under Texas law, the Attorney General enjoys an exclusive right to represent state agencies; other attorneys who may be permitted to

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[6] *TEX. CODE CRIM. PROC. ANN. art. 2.01* provides:

> Each district attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom, except in cases where he has been, before his election, employed adversely. When any criminal proceeding is had before an examining court in his district or before a judge upon habeas corpus, and he is notified of the same, and is at the time within his district, he shall represent the State therein, unless prevented by other official duties. It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done. They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused.

assist the Attorney General are subordinate to his authority."); *League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 844 (5th Cir. 1993)* (en banc) ("The Attorney General may represent state officials in their official capacities . . . .").

Furthermore, since the Attorney General is properly representing the State in this case, Texas law does not permit the District Attorney to assume representation of the State as well. Under Texas law, "either the Attorney General or a county or district attorney may represent the State in a particular situation, but these are the only choices, whichever official represents the State exercises exclusive authority and if services of other lawyers are utilized, they must be 'in subordination' to his authority." *Hill v. Tex. Water Quality Bd., 568 S.W.2d 738, 741 (Tex. Civ. App. -- Austin 1978, writ ref'd n.r.e.)*; cf. *Saldano, 70 S.W.3d at 883* ("The State has only one interest in a criminal case, and the State can be represented by only one attorney in making such decisions as whether to seek review and whether to confess error."). As the Texas Court of Criminal Appeals aptly noted in a state habeas appeal: "In every appeal, such decisions must be made as whether to appeal, . . . what points to raise[,] whether to confess error, . . . whether to seek further review and on what grounds. Some one person must make these decisions; there cannot be conflicting decisions." *Ex Parte Taylor, 36 S.W.3d 883, 887 (Tex. Crim. App. 2001)* (en banc) (per curiam). In sum, Texas law does not grant the District Attorney the authority to represent the State here. Thus, the District Attorney's interest in this case is not one which the substantive law recognizes as belonging to or being owned

by the applicant." *New Orleans Pub. Serv., Inc., 732 F.2d at 464.*

Nevertheless, the District Attorney argues that his intervention is proper in light of *Baker v. Wade, 769 F.2d 289 (5th Cir. 1985)* (en banc), overruled on other grounds by *Lawrence v. Texas, 539 U.S. 558, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003).* In Baker, a federal district court ruled that Texas's sodomy statute was unconstitutional and enjoined a class of Texas officials from enforcing the statute. *Id. at 291.* A district attorney, who was an unnamed member of the defendant class, sought to appeal the district court's judgment, since the Attorney General had declined to do so. *Id.* The district attorney filed a motion to intervene and to be named a class representative, and a Fifth Circuit judge granted the motion. Id. The en banc court ruled that the district attorney had a sufficient interest in the suit for purposes of intervention because he had been specifically enjoined by the district court from enforcing Texas's sodomy statute and, thus, his power to enforce the State's criminal laws had been impaired. *Id. at 291-92.*

The District Attorney's reliance on *Baker* is misplaced. Unlike the district attorney in Baker, who was an unnamed member of the defendant class, the District Attorney is not a party to this case. Therefore, the District Attorney is not legally bound by the district court's decision to grant habeas relief in the same way in which the district attorney in Baker was bound.[7] Furthermore, in

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[7] Because, however, the District Attorney must still "represent the State in all criminal cases in the district courts of his district and in appeals therefrom," *TEX. CODE CRIM. PRO. art 2.01,* he is "bound" to make a decision on how to proceed in the light of intervening decisions.

Baker, the injunction clearly impaired the district attorney's ability to carry out his official duties under state law because it prevented him from enforcing one of Texas's criminal laws. Here, by contrast, the District Attorney has not been prevented from performing his duties under Texas law because he may still seek the death penalty in this and other cases.[8] Thus, the District Attorney has not demonstrated that his interest in this case is "substantial" and "legally cognizable" like the district attorney's interest in Baker. Consequently, while intervention was proper in Baker, it is not proper under the facts of this case.[9]

It is true that the District Attorney will be affected, as a practical matter, by the district court's order. The District Attorney certainly worked hard to obtain a conviction and to defend the conviction and sentence on appeal. Understandably, the District Attorney does not wish to undergo the costs and burdens of conducting a new sentencing hearing. If this were a sufficient interest to

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Naturally, in exercising that authority and carrying out that responsibility, he is obligated, as an attorney and officer of the court, to heed governing caselaw.

[8] Although the District Attorney may no longer elicit testimony regarding the correlation between race and future dangerousness, the district court's order has not impaired his job function because, under Texas law, district attorneys are not permitted to present such testimony in any case. *TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(2)* (Vernon Supp. 2004) ("Evidence may not be offered by the state to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct.").

[9] We also note that we have never applied *Baker* in the context of habeas corpus, and we see no reason to do so here.

justify intervention, however, a state district attorney would be able to intervene in almost any habeas corpus suit where he did not agree with the Attorney General's method of representing the State. This outcome would be contrary to state law, which has chosen the Attorney General, rather than the various district attorneys, to represent the State in federal habeas corpus suits.

Furthermore, even if the District Attorney's interest in this suit were sufficient to permit his intervention, we would nevertheless conclude that *Rule 24* intervention is improper because the District Attorney has not demonstrated that he meets the fourth requirement for intervention: that his interest is inadequately represented by the existing parties. *Doe, 256 F.3d at 375.* To meet this requirement, a potential intervenor must show that the representation of his interest by existing parties to the suit "'may be'" inadequate. *Edwards v. City of Houston, 78 F.3d 983, 1005 (5th Cir. 1996)* (en banc) (quoting *Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10, 30 L. Ed. 2d 686, 92 S. Ct. 630 (1972)).*

The District Attorney contends that the Attorney General is not representing his interest in this case because the Attorney General is not adequately representing the State's interest. According to the District Attorney, the Attorney General's representation of the State's interest is inadequate because the Attorney General "aligned himself with Saldano and joined Saldano in urging the district court to vacate Saldano's sentence" and because the Attorney General did not appeal the district court's order granting habeas relief to Saldano.

As the District Attorney has conceded, however, the Attorney General has discretion to confess error and to waive procedural default. See, e.g., *Alba v. Johnson, 232 F.3d 208 (5th Cir. 2000)* (unpublished opinion) (accepting the Texas Attorney General's confession of error);[10] *Brown v. State, 95 Tex. Crim. 664, 664, 255 S.W. 750, 751 (1923)* (accepting the Attorney General's confession of error); cf. *McGee v. Estelle, 722 F.2d 1206, 1212 (5th Cir. 1984)* ("As the chief legal officer of the state, the attorney general is the appropriate person to assert, or to waive" habeas exhaustion requirements.). The Attorney General is not an inadequate representative simply because he has taken these actions, especially when state law gives him the authority to do so.

It is true that, in exercising his discretion to confess error and to waive procedural default, "the Attorney General cannot bind state officials, his clients, to his own policy preferences." *Clements, 999 F.2d at 840.* There is no indication, however, that the Attorney General is acting contrary to the will of the State or his client, Director Dretke. Indeed, there is evidence that the Attorney General's confession of error and waiver of procedural default furthers the State's goal of ensuring that capital sentencing is untainted by racial prejudice, as manifested by recently enacted state legislation. See *TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(2)* (Vernon Supp. 2004) ("Evidence may not be offered by the state to establish that the race or ethnicity of the defendant makes

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[10] Alba involved almost identical facts--indeed, even the same expert witness--as this case.

it likely that the defendant will engage in future criminal conduct.").

Moreover, the Attorney General's failure to appeal does not make him an inadequate representative of the State's interest. In Baker, we stated that,

> In this case where the district court has rejected binding Supreme Court authority, the circuit court is entitled to conclude as a matter of law that those interests were inadequately represented by those who failed to pursue the appeal and that the state officer seeking to intervene was a proper party to do so.

769 F.2d at 292. According to the District Attorney, Baker stands for the proposition that a party's failure to appeal an adverse judgment renders the party an inadequate representative of the potential intervenor's interest. Crucial to our holding in Baker, however, was not simply that the Attorney General chose not to appeal, but that the Attorney General failed to appeal where, as the en banc court saw it, "binding Supreme Court authority" indicated that the statute was not, in fact, unconstitutional. *Id.* While we need not decide whether the Attorney General's confession of error was correct--indeed, as we explain below, we do not have jurisdiction to decide this question--we can conclude that the district court, by accepting the Attorney General's confession of error, did not ignore binding Supreme Court authority. Cf. *McCleskey v. Kemp, 481 U.S. 279, 309 n.30, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987)* ("The Constitution prohibits racially biased prosecutorial arguments."); *Baldwin v. Alabama, 472 U.S.*

372, 382, 86 L. Ed. 2d 300, 105 S. Ct. 2727 (1985) ("[A] death sentence based upon consideration of 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race . . . of the defendant,' would violate the Constitution." (dictum) (quoting *Zant v. Stephens, 462 U.S. 862, 885, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983)*)). Similarly, without deciding whether the district court was correct in accepting the State's waiver of procedural default and waiver of harmless error, we hold that the district court did not ignore Supreme Court authority in so doing.[11] Cf. *Trest v. Cain, 522 U.S. 87, 89, 139 L. Ed. 2d 444, 118 S. Ct. 478 (1997)* ("Procedural default is normally a 'defense' that the State is 'obligated to raise' and 'preserve' if it is not to 'lose the right to assert the defense thereafter.'" (second alteration in original) (quoting *Gray v. Netherland, 518 U.S. 152, 166, 135 L. Ed. 2d 457, 116 S. Ct. 2074 (1996)*)) 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 31.2a (4th ed. 2001) ("The 'harmless error' obstacle does not arise unless the state asserts it; the state's failure to do so in a timely and unequivocal fashion waives the defense."). Consequently,

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[11] As the District Attorney points out, Coleman v. Thompson held that federal habeas review is barred--absent a showing of cause and prejudice, or a fundamental miscarriage of justice--when a state prisoner has defaulted his federal claim pursuant to an adequate and independent state bar, such as Texas's contemporaneous objection rule. *501 U.S. 722, 750, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991)*. The district court did not violate the rule announced in Coleman, however, when it granted habeas relief to Saldano. Coleman does not prevent a State from waiving a procedural bar in the first place. See *Trest v. Cain, 522 U.S. 87, 89, 139 L. Ed. 2d 444, 118 S. Ct. 478 (1997)* (holding that procedural default is a defense that the State must raise).

there is no reason to conclude that the Attorney General's decision not to appeal makes him an inadequate representative of the State's interest.

Finally, the District Attorney contends that the Attorney General inadequately represents his interest because the Attorney General's position in this case is directly contrary to the position taken by the District Attorney. In Ex Parte Taylor, the Court of Criminal Appeals rejected a very similar argument:

> The district attorney argues finally that he and the State Prosecuting Attorney should be allowed to file separate petitions because they have different interests: he wants to win only one case, while the State Prosecuting Attorney has to look out for all the cases of all the prosecutors of the state. We emphatically disagree. The State of Texas has only one, indivisible interest in a criminal prosecution: to see that justice is done.

36 S.W.3d at 887 (footnote omitted). In other words, even though the Attorney General and the District Attorney might choose to vindicate the State's interest in different ways, the fact remains that the Attorney General and the District Attorney share an identical interest in this case: to see that justice is done. See *TEX. CODE CRIM. PROC. ANN. art. 2.01* (Vernon Supp. 2004) ("The primary duty of all prosecuting attorneys [is] not to convict, but to see that justice is done."). In confessing error and waiving Saldano's procedural default, the Attorney General has taken the position that justice in this case requires that

Saldano be resentenced. This choice is not unreasonable under the circumstances. Simply because the District Attorney would have made a different decision does not mean that the Attorney General is inadequately representing the State's interest--and hence, the District Attorney's claimed interest--especially since state law specifically gives the Attorney General the discretion to make these kinds of decisions.[12]

Because we conclude that the District Attorney does not have a "direct, substantial, and legally protectable interest" in these proceedings, and that any interest he does have is adequately represented by the Attorney General, we hold that the district court properly denied his application for intervention under *Rule 24(a)(2)*. See *Espy, 18 F.3d at 1205* ("If a party seeking to intervene fails to meet any one of [*Rule 24(a)(2)*'s] requirements, it cannot intervene as a matter of right.").

III. GRANT OF HABEAS RELIEF

In light of our ruling on intervention, we do not have jurisdiction to address the remaining issues raised by the District Attorney in his appellate brief. See *Marino v.*

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[12] The District Attorney also suggests that Attorney General is inadequately representing the State's interest by failing to defend the Court of Criminal Appeals's decision in *Saldano v. State, 70 S.W.3d at 876-78*. The Court of Criminal Appeals, however, does not alone express the will of the State; before our court, the Attorney General is the proper official to speak for the State. As we stated in McGee, "deference is due the states, as governmental units, not their courts, their executives, or their legislatures, save as these bodies represent the state itself." *722 F.2d at 1212*.

Ortiz, 484 U.S. 301, 304, 98 L. Ed. 2d 629, 108 S. Ct. 586 (1988) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled."); *Edwards, 78 F.3d at 993* ("Because [the applicants] were denied leave to intervene, and thus never obtained the status of party litigants in this suit, we dismiss their appeals, insofar as they seek review of the district court's final judgment [on the merits]. ").

IV. CONCLUSION

Accordingly, we AFFIRM the district court's order denying the District Attorney's application to intervene in this case and DISMISS the District Attorney's appeal of the district court's order granting habeas relief.

Appendix B

Memorandum Opinion of United States District Court for the Eastern District of Texas, Beaumont Division (June 12, 2003)

VICTOR HUGO SALDANO, PETITIONER, JOHN R. ROACH, CRIMINAL DISTRICT ATTORNEY OF COLLIN COUNTY, TX, INTERVENOR-PLAINTIFF v. JANIE COCKRELL TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, RESPONDENT, TOM O'CONNELL, MATTHEW PAUL, GOVERNMENT OF THE REPUBLIC OF ARGENTINA, MOVANTS

Civil Action No. 1:02cv217

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION

267 F. Supp. 2d 635; 2003 U.S. Dist. LEXIS 10048

June 12, 2003, Decided
June 12, 2003, Opinion Filed

COUNSEL: For Petitioner: Stanley George Schneider, Thomas D. Moran of Schneider & McKinney, Houston, TX.

For Intervenor-Plaintiff: John Anthony Stride, Collin County District Attorney Office, McKinney, TX.

For Respondent: Julie Caruthers Parsley, Attorney General's Office, Austin, TX.

For Tom O'Connell and Matthew Paul, movants: John Anthony Stride, Collin County District Attorney Office, McKinney, TX.

For Government of the Republic of Argentina: Scott J. Atlas, Sarah Beth Landau of Vinson & Elkins, Houston, TX.

JUDGES: RICHARD A. SCHELL, UNITED STATES DISTRICT JUDGE.

OPINIONBY: RICHARD A. SCHELL

OPINION:

MEMORANDUM OPINION

Victor Hugo Saldano ("Saldano"), an inmate confined in the Texas Department of Criminal Justice, Institutional Division, filed an amended petition for a writ of *habeas corpus* on August 5, 2002. Saldano challenged his death sentence imposed in the 199th Judicial District Court of Collin County, Texas in cause No. 199-80049-96, styled *The State of Texas vs. Victor Hugo Saldano, a/k/a Victor Rodriguez.* For the reasons set forth below, the court finds that the amended petition is well-taken and it will be granted.

Factual and procedural background

On November 20, 1995, Saldano kidnapped and killed Paul King. King's car was parked in a parking lot by a grocery store in Plano, Texas. Saldano and an accomplice forced King into his car and drove to a secluded country road. Saldano shot King five times, took his watch and wallet, and left his body by the roadside. The kidnappers

drove King's car for a short time before abandoning it. Saldano was arrested within a few hours of the killing.

On January 24, 1996, Saldano was indicted for capital murder, and on July 11, 1996, he was convicted by a jury of the charge. The trial court subsequently conducted a punishment hearing. Under Texas law, the jury is required to determine whether there is a probability that the defendant will commit acts of criminal violence that will pose a continuing threat to society. To establish this element, the State of Texas, represented by the Collin County Criminal District Attorney ("District Attorney"), presented the expert testimony of Dr. Walter Quijano.[1]

Quijano testified that in his opinion, there was a probability that Saldano would be dangerous to society in the future. Asked to explain the basis of his opinion, Quijano said that his opinion was based on an analysis of 24 factors. One of the factors that Quijano used to predict future dangerousness was race and ethnicity. He testified that Saldano's Hispanic ethnicity increased the likelihood that he would be a danger in the future. Quijano explained that Hispanics were over-represented in the Texas prison system, and to him this fact suggested a correlation between ethnicity and future dangerousness. Quijano admitted that other factors, such as education and economic status, are at least partly responsible for that

[1] Under Texas law, the jury was free to consider the evidence it heard in the guilt/innocence phase of the trial in determining Saldano's future dangerousness. Other evidence on the issue included the random nature and needless cruelty of the crime, Saldano's lack of remorse and his attempted aggravated robbery five days before the murder.

over-representation. He testified that no particular weight should be given to any factor and that the jurors should make the determination for themselves on what weight to give each factor.

Saldano's counsel did not object to Quijano's testimony. Instead, he cross-examined Quijano about the validity of race and ethnicity as a factor and whether Saldano, an Argentine national, should be categorized as Hispanic. He also offered contrary expert witness testimony discounting the relative value of race and ethnicity as a predictive factor.

In his closing arguments, the prosecutor did not emphasize Saldano's race and ethnicity, although he did tell the jury to rely on the 24 factors about which Dr. Quijano had testified:

> Our expert told you [that there was a probability that Saldano would be dangerous in the future] and you can have confidence in his opinion beyond a reasonable doubt because of his qualifications and his background, and his expertise. Consider what he did tell you. He didn't tell you this man is a danger - I mean, he did tell you that, but how did he get there? This is how he told you to get there. He gave you factors or markers to go through, 24 of them, outlining them. And he wants you to put in what you've heard and learned about this offense and the defendant, [and] plug them into that formula. This is a formula recognized in the field as to what would constitute dangerousness in a person. You do the work and plug it in.

On July 15, 1996, the jury found that there was a probability that Saldano would commit criminal acts of violence that would constitute a continuing threat to society, and it further found that there were not sufficient

mitigating circumstances to warrant the imposition of a sentence of life imprisonment rather than death. Accordingly, the trial judge sentenced him to death.

On appeal, Saldano claimed that he was denied due process of law because his race and ethnic background were improperly used to support the finding of "future dangerousness" in the punishment phase of his trial. The State of Texas, represented at this point by the District Attorney and the Texas State Prosecuting Attorney ("Prosecuting Attorney"), contended that this claim was not preserved for review because Saldano did not object to Dr. Quijano's testimony at trial. On September 15, 1999, the Texas Court of Criminal Appeals affirmed Saldano's conviction and sentence.[2] It refused to consider the denial of due process claim because Saldano's trial counsel had not objected to Quijano's testimony during the trial. Saldano then petitioned the Supreme Court of the United States for a writ of *certiorari*, and filed a petition for a writ of *habeas corpus* in this court.

At this point, the Texas Attorney General ("Attorney General") replaced the Prosecuting Attorney as counsel for the State of Texas. In its response to the petition for writ of *certiorari*, the State confessed error on Saldano's claim. The Supreme Court granted the writ of *certiorari*, vacated the Texas Court of Criminal Appeals' judgment and remanded the case to that court for further consideration in light of the confession of error. *Saldano v. Texas, 530 U.S. 1212, 147 L. Ed. 2d 246, 120 S. Ct. 2214*

[2] On May 5, 1999, that court also denied Saldano's application for State post-conviction relief.

(2000). In light of this ruling, Saldano voluntarily dismissed his federal *habeas corpus* petition.

After the Supreme Court's ruling, four other death-row inmates, each of whom had been sentenced to death as a result of punishment phase hearings in which Quijano gave substantially similar testimony, petitioned the federal courts for new sentencing hearings. In each of those four cases, the Respondent, represented by the Attorney General, confessed error and in each case the federal court granted relief.[3]

On remand, the Texas Court of Criminal Appeals reinstated Saldano's conviction and death sentence. *Saldano v. State, 70 S.W.3d 873* (Tex. Crim. App. 2002.) In the proceedings before that court, the State of Texas was represented by the Prosecuting Attorney. (The District Attorney and the Attorney General were both allowed to file briefs *amicus curiae.*) The Prosecuting Attorney raised the defense that any error in the admission of Dr. Quijano's testimony had been waived by Saldano's failure to object at trial. The Texas Court of Criminal Appeals, based upon this defense, again refused to consider the merits of the due process claim. *Id.*

On April 12, 2002, Saldano refiled his petition for a writ of *habeas corpus* in this court, again raising his due process claim as well as a claim of ineffective assistance of counsel. Respondent Janie Cockrell ("the Director"),

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[3] The cases were *Avalos-Alba v. Johnson, 232 F.3d 208 (5th Cir. 2000), Garcia v. Johnson,* No. 99cv134 (E.D.TX. September 7, 2000), *Blue v. Johnson,* No. H-99-0350 (S.D.TX. Oct. 2, 2000), and *Broxton v. Johnson,* No. H-00cv1034 (S.D.TX. Mar. 28, 2001).

represented by the Attorney General, explicitly waived the defense that the claim was barred under the doctrine of procedural default, confessed error on the claim, and joined in Saldano's request that he receive a new sentencing hearing. On July 16, 2002, this court allowed the District Attorney and Prosecuting Attorney (jointly) and the Republic of Argentina to file briefs *amici curiae*, but abstained from deciding the District Attorney's motion to intervene on the grounds that the issue of whether the District Attorney should be allowed to raise an affirmative defense that the Attorney General on behalf of the Respondent had explicitly declined to raise involved a question of conflicting litigation strategy best left to the State of Texas to resolve. On August 5, 2002, Saldano filed an amended petition dropping the ineffective assistance of counsel claim, and on August 13, 2002, the District Attorney appealed this court's denial of its motion to intervene to the United States Court of Appeals for the Fifth Circuit. On February 18, 2003, the Court of Appeals reversed this court's July 16, 2002, order abstaining from deciding the motion to intervene and remanded the case to this court with instructions to decide the motion to intervene on the merits.

Analysis

A. the motion to intervene

Fed.R.Civ.P. 24 (a)(2) provides that a person shall be permitted to intervene if he claims an interest in the transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the existing parties to the litigation

adequately represent his interest. The "interest" an intervener claims must be direct, substantial, and legally protectable. *New Orleans Public Service Inc. v. United Gas Pipeline Co., 732 F.2d 452, 463 (5th Cir.)(en banc), cert. denied, 469 U.S. 1019, 83 L. Ed. 2d 360, 105 S. Ct. 434 (1984).*

In the present case, the District Attorney claims that he has an interest in the sentence of death imposed upon Saldano and an interest in not having to conduct another sentencing hearing. It is undisputed that the respondent, represented by the Attorney General, is not seeking to protect these interests and that disposition of this case in the absence of the District Attorney's participation as a party would, as a practical matter, impair or impede those interests. The only question for the court is whether those interests are direct, substantial and legally protectable. The court finds that they are not.

The District Attorney cites no authority, and this court has found none, which supports the proposition that a prosecutor's interest in a particular jury verdict is sufficiently direct, substantial and legally protectable that he should be allowed to intervene in collateral civil litigation over the constitutionality of the procedures he employed in obtaining that verdict. Although the Fifth Circuit has not addressed this precise issue, the most analogous case on this point suggests the contrary. In *Baker v. Wade, 769 F.2d 289 (5th Cir. 1985), cert. denied, 478 U.S. 1022, 92 L. Ed. 2d 742, 106 S. Ct. 3337, 106 S. Ct. 3338 (1986),* a homosexual man sued several state officials, including all of the district attorneys of the State of Texas, in federal district court, seeking to bar enforcement of a state statute criminalizing homosexual conduct. The district court held

that the statute was unconstitutional. One of the district attorneys, believing that the statute was constitutional, asked the attorney general to appeal the court's ruling. The attorney general initially filed a notice of appeal, but then declined to pursue the appeal. The district attorney then moved to intervene in order to prosecute the appeal. The Fifth Circuit granted the district attorney's motion to intervene under *Fed.R.Civ.P. 24 (a)(2)*, finding that he had an interest in the constitutionality of the statute by virtue of being a state official empowered by Texas law to enforce its laws. The Court of Appeals further found that by failing to appeal a judgment holding that the statute was unconstitutional, the attorney general inadequately represented the district attorney's interests. *Id. at 291-92.*

The rationale behind this holding seems to be that because a district attorney enforces the state's laws by prosecuting offenders who violate those laws, as a practical matter his ability to do this is impeded and/or impaired if the law he is trying to enforce is held unconstitutional. Accordingly, whenever the constitutionality of a statute is challenged, the district attorney's interest in enforcing that statute by prosecuting those who violate it is direct, substantial and legally protectable. If the attorney general refuses to defend the statute's constitutionality, then the disposition of the case in the absence of the district attorney's participation will, as a practical matter, impair or impede the district attorney's ability to enforce that law by prosecuting offenders who violate it.

The key point from this analysis is that the Court of Appeals in *Baker* seems to define the district attorney's

interest as his *ability* to enforce the law by prosecuting offenders. This definition is significant. In the present case, the disposition of this case in the absence of the district attorney's intervention will neither impede nor impair his ability to enforce the law by prosecuting capital cases in general or by seeking the death penalty against Saldano in particular. The worst that can happen from the District Attorney's point of view is that Saldano and the State of Texas will be returned to the positions they were in immediately after Saldano was convicted of capital murder. At that point, the District Attorney will still have the same ability to seek the death sentence that he had at trial. Under these circumstances, the court finds that the District Attorney's ability to enforce the law by prosecuting cases in general, and this case in particular, has been neither impeded nor impaired.[4]

Because the District Attorney cannot establish that his direct, substantial, legally protectable interests will be impaired or impeded by the disposition of this case in his absence as a party, his motion to intervene will be denied.[5]

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[4] Limiting a prosecutor's legally protectable interest for purposes of intervention in a *habeas corpus* case to situations in which it is his ability to prosecute an offender that is threatened, rather than merely the particular sentence given an offender, is consistent with the well-settled principle that the primary duty of the prosecutor is not merely to convict, but to see that justice is done. *See TEX. CODE CRIM. PROC. art. 2.01.*

[5] The court also notes that in *Baker,* the Fifth Circuit appeared to consider material the fact that the federal district court's judgment that the statute was unconstitutional was contradicted by precedent from the Supreme Court of the United States. *See 769 F.2d at 292.* That is, of course, not the case here. Perhaps more important is that in that case the

B. the claim for relief

Saldano claims that he was denied due process of law and equal protection of the laws by the trial court's admission of, and the prosecution's reference to, Dr. Quijano's testimony that Saldano's Hispanic ethnicity was a positive factor for predicting future dangerousness. The Director has confessed error on the claim. The District Attorney and Prosecuting Attorney as *amici curiae* contend that this court is barred from considering the merits of that claim because it has been procedurally defaulted. They also contend that even if this claim is considered on its merits, the constitutional error was harmless. The Director has explicitly waived the procedural default defense, and because she joined in Saldano's request for relief, the Court finds that she has intentionally, albeit implicitly, waived the harmless error defense as well. The court must determine whether constitutional error occurred, and, if it did, whether the affirmative defenses to relief on that error have been effectively waived.

1. validity of the confession of error

While the court accords the Director's confession of error great weight, it is required to perform an independent analysis of Saldano's claim. *Every v. Blackburn, 781 F.2d 1138, 1140 (5th Cir. 1986).* The court

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district attorney at all times took the position that the statute at issue was constitutional; in the present case, the District Attorney does not disagree with the Director that constitutional error occurred. The District Attorney's disagreement with the Director's litigation strategy is limited to the Director's choice to waive two affirmative defenses that would arguably have precluded granting relief for the error.

finds that the admission of the previously mentioned portions of Quijano's testimony and the District Attorney's reference to that testimony during closing argument constituted constitutional error because the testimony and argument invited the jury to determine whether Saldano would receive the death penalty based in part upon his race and ethnicity. Considerations of race and ethnicity are irrelevant to the determination of future dangerousness, *Thompson v. Davis, 295 F.3d 890, 894 n.4 (9th Cir. 2002), cert. denied, U.S. , 155 L. Ed. 2d 311, 123 S. Ct. 1570 (2003),* and relying upon them in deciding punishment denies a defendant an individualized sentencing determination as guaranteed by the *Eighth Amendment. Cf. Guerra v. Collins, 916 F. Supp. 620, 636 (S.D. Tex. 1995), aff'd, 90 F.3d 1075 (5th Cir. 1996)* (that defendant was an illegal alien is irrelevant for determining whether death penalty should be imposed.) Accordingly, the admission of and reference to expert opinion testimony to the effect that a person is more likely to be dangerous in the future because he is a member of a racial or ethnic group that happens to be over-represented in the prison population is constitutional error. *See Bains v. Cambra, 204 F.3d 964, 974 (9th Cir.), cert. denied, 531 U.S. 1037, 148 L. Ed. 2d 536, 121 S. Ct. 627 (2000); see also Guerra, 916 F. Supp. at 636.*

2. validity of the waiver of affirmative defenses

Both procedural default and harmless error are affirmative defenses which are waived by the respondent if not timely and unequivocally raised. *See Gray v. Netherland, 518 U.S.152, 165-66, 135 L. Ed. 2d 457, 116 S. Ct. 2074 (1996)* and *Lam v. Kelchner, 304 F.3d 256, 269 (3d Cir. 2002).* Even when these defenses have been waived,

however, a court may, in its discretion, consider the defenses *sua sponte*. *See e.g. Magouirk v. Phillips, 144 F.3d 348, 358 (5th Cir. 1998)* (procedural default); *United States v. McLaughlin, 126 F.3d 130, 135 (3d Cir. 1997) cert. denied, 524 U.S. 951, 141 L. Ed. 2d 735, 118 S. Ct. 2366 (1998)* (harmless error). Because the District Attorney and Prosecuting Attorney are not parties, the court construes the assertion of these affirmative defenses by *amici curiae* as a request that this court consider the defenses *sua sponte*. The initial inquiry is whether the court should, in its discretion, do so.

a. procedural default

Regarding the procedural default defense, the United States Court of Appeals for the Fifth Circuit has held that a district court should not, in a typical case, consider *sua sponte* whether a claim is procedurally defaulted if the respondent explicitly waives that defense. *Magouirk, 144 F.3d at 359-60.* A district court may, however, refuse to honor the respondent's waiver if accepting it would not be in the interests of comity or judicial economy. *Id.*

The court finds that the interest of comity is not adversely affected by honoring the Director's waiver in this case. As a matter of federal-state comity, a federal court should allow a state appellate court to enforce its own procedures and rules. *McGee v. Estelle, 704 F.2d 764, 769 (5th Cir. 1983).* When this case was before the Texas Court of Criminal Appeals, the District Attorney and Prosecuting Attorney raised the failure to preserve error defense, and that court accordingly found that it was precluded from considering the merits of Saldano's claim. The Texas Court of Criminal Appeals has held, however,

that the failure to preserve error is an affirmative defense which can be waived by the State. See *Tallant v. State, 742 S.W.2d 292, 294 (Tex. Crim. App. 1987).* Accordingly, honoring the Director's waiver of the procedural default defense in federal court in no way frustrates the Texas Court of Criminal Appeals' ability to enforce its own procedures and rules.

This case presents another, less common comity interest - federal intra-court comity. Under this doctrine, absent unusual circumstances, judges of coordinate jurisdictions within a jurisdiction should follow brethren judge's rulings, particularly regarding the treatment of similarly-situated criminal defendants. *United States v. Anaya, 509 F. Supp. 289, 293 (S.D.Fla. 1980) (en banc), aff'd., 685 F.2d 1272 (11th Cir. 1982).* As explained on page four, after Saldano first raised this claim, four other petitioners raised identical claims, and in no case did the federal courts exercise their discretion to consider *sua sponte* whether the claims were procedurally defaulted. Accepting the Director's waiver of procedural default in the present case is consistent with the actions of four other federal courts who faced the same material facts. Accordingly, declining to raise the procedural default of Saldano's claim *sua sponte* would not adversely affect the interests of either federal-state or federal intra-court comity.

The court finds further that it is not adverse to the interest of judicial economy to honor the Director's waiver of the procedural default defense. At worst, the State will have to conduct a new punishment hearing for Saldano that it would not have had to conduct had the procedural

default defense been raised *sua sponte*. This is no different than the burden in any case where relief is granted. *Compare Clisby v. Jones, 960 F.2d 925, 937 (11th Cir. 1992)* (interest of judicial economy in *habeas corpus* proceedings is served by avoiding piecemeal litigation).

Because the interests of comity and judicial economy will not be adversely affected by accepting the Director's waiver of the procedural default defense, the court will decline to consider *sua sponte* whether this claim is barred by procedural default.

b. harmless error

The Fifth Circuit has not yet decided whether a state entity can waive the harmless error defense, but the circuits that have addressed this issue have generally held that a court should consider three factors in determining whether to *sua sponte* raise the issue of whether a constitutional violation was harmless: (1) the length and complexity of the record, (2) whether the harmlessness of the error is certain or debatable, and (3) whether a reversal will result in a protracted, costly and ultimately futile proceeding in the district court. *See e.g., United States v. Giovannetti, 928 F.2d 225, 227 (7th Cir. 1991); see also McLaughlin, 126 F.3d at 135* (citing cases).

The problem with applying the *Giovannetti* test to the present case is that none of the courts that applied that test were faced with an intentional waiver of the harmless error defense. Instead, in those cases, petitioners claimed that a constitutional error occurred, and respondents denied the error. The courts, after finding that such error did occur, considered whether to determine *sua sponte* if

the error was harmless. The respondents' failure to raise the harmless error defense in those cases was due either to inadvertence or to a mistaken belief that the issue would not be material, rather than the product of deliberate waiver. The intentional nature of the Director's waiver of the harmless error defense in the present case suggests that this court should apply the *Magouirk* test, rather than the *Giovannetti* test.

As stated above, under *Magouirk*, a court should honor a respondent's deliberate waiver of an affirmative defense unless doing so adversely impacts the interests of comity or judicial economy. Regarding federal-state comity, because the Texas Court of Criminal Appeals never reached the issue of harmless error, this court's acceptance of the Director's waiver of that defense would in no way frustrate that court's ability to enforce its own procedures and rules. In addition, as also explained above, failing to accept the Director's waiver would negatively affect the interest of federal intra-court comity. That is, none of the other four courts who considered this issue, in the context of similarly situated defendants, raised the harmless error issue *sua sponte*.

Regarding judicial economy, as stated above, granting relief in this case would result in no extra work for the state court other than what normally results from a grant of *habeas corpus* relief.

In summary, under the *Magouirk* test, this court should honor the Director's explicit waiver of the procedural default of Saldano's claim. Because the Director also intentionally waived the harmless error defense to this claim, the court finds that the *Magouirk* test, rather than the

Giovannetti test, should be applied to the issue of whether the court should honor the Director's waiver of the harmless error defense issue. Finally, because honoring the Director's waiver would not adversely affect the interests of comity or judicial economy the court reaches the same result regarding the Director's waiver of the harmless error defense as it did regarding her waiver of the procedural default defense. The court declines to exercise its discretion to consider *sua sponte* whether the constitutional error which occurred in this case was harmless.

3. effect of finding of trial error and of waiver of harmless error

Traditionally, constitutional error was presumed harmful and this presumption had to be rebutted by the state. *See Chapman v. California, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967).* Under current case law, structural errors are presumed to be prejudicial, but mere trial errors do not result in reversal unless the error had a substantial and injurious effect or influence in determining the jury's verdict. *Childress v. Johnson, 103 F.3d 1221, 1230 (5th Cir. 1997).* In the present case, the admission of Dr. Quijano's testimony is a trial error, not a structural error, *see Bains, 204 F.3d at 974,* and the Supreme Court of the United States and several circuits have been divided about whether the harmlessness or harmfulness of a trial error should be considered part of the petitioner's *prima-facie* case, an affirmative defense, or the subject of independent inquiry by the trial court. *See O'Neal v. McAninch, 513 U.S. 432, 435-36, 130 L. Ed. 2d 947, 115 S. Ct. 992 (1995); Payton v. Woodford, 299 F.3d 815, 827 (9th Cir. 2002) (en banc),* vacated on other grounds, *155 L. Ed. 2d 662, 123 S. Ct. 1785 (2003).*

To dispose of the amended petition in this case, the court must clarify the general constitutional error rule and settle the harmless error burden of proof issue. In *habeas corpus*, a structural error raises an irrebuttable presumption of prejudice, while a trial error raises a presumption of prejudice which is rebutted if the court determines that a preponderance of the evidence in the record establishes that the error did not have a substantial and injurious effect or influence in determining the jury's verdict. *See generally Cooper v. Taylor, 70 F.3d 1454, 1462 (4th Cir. 1995) aff'd on rehearing en banc, 103 F.3d 366 (4th Cir. 1996), cert. denied, 522 U.S. 824, 139 L. Ed. 2d 40, 118 S. Ct. 83 (1997).* As long as the respondent timely and clearly raises the defense, the court must perform a harmless error analysis. In addition, the court may, in its discretion, perform such an analysis *sua sponte*, even if it is waived by the State. *See McLaughlin, 126 F.3d at 135.* If the court chooses to accept an intentional waiver or enforce an inadvertent waiver of the harmless error defense by the respondent, however, the presumption of harm is not rebutted and the petitioner is entitled to relief. *See e.g., Cook v. McKune, 323 F.3d 825, 840 (10th Cir. 2003).*

Conclusion

Because the court finds that constitutional error occurred in this case, and because the court decides in its discretion to honor the Director's waiver of the affirmative defenses of procedural default and harmless error, it finds that Saldano is entitled to relief on his claim.

The Collin County District Attorney's motion to intervene will be denied, and Saldano's amended petition

for writ of *habeas corpus* will be granted. The court will enter an order denying the motion and a judgment issuing a writ of *habeas corpus.*

SIGNED this 12 day of June, 2003.

RICHARD A. SCHELL

UNITED STATES DISTRICT JUDGE

ORDER DENYING MOTION TO INTERVENE AND JUDGMENT GRANTING PETITION FOR WRIT OF *HABEAS CORPUS*

This matter came before the court on the Collin County Criminal District Attorney's motion to intervene pursuant to *Federal Rule of Civil Procedure 24(a)(2),* (docket entry # 6), filed on June 6, 2002, and applicant Victor Hugo Saldano's ("Saldano") amended petition for writ of *habeas corpus* (docket entry # 14), filed on August 5, 2002. For the reasons stated in the memorandum opinion signed on this same date, IT IS ORDERED that the Collin County District Attorney's motion to intervene is DENIED; and,

JUDGMENT is hereby entered for Saldano on the single claim in his amended petition. A writ of *habeas corpus* is issued to Janie Cockrell, the Director of the Texas Department of Criminal Justice, Institutional Division, ordering her to release Saldano from custody unless the State of Texas, within 180 days from the date of entry of this order and judgment, either commences a new punishment hearing or reforms his sentence to life imprisonment.

SIGNED this 12 day of June, 2003.

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

Appendix C

Opinion of the Texas Court of Criminal Appeals
(March 13, 2002)

VICTOR HUGO SALDANO, Appellant

v.

THE STATE OF TEXAS

NO. 72,556

COURT OF CRIMINAL APPEALS OF TEXAS

70 S.W.3d 873; 2002 Tex. Crim. App. LEXIS 49

March 13, 2002, Delivered

COUNSEL: ATTORNEYS FOR APPELLANT: Stanley G. Schneider, Houston, Scott J. Atlas, Amicus Curiae, Houston, Gregory S. Coleman, Assist. AG, Austin.
ATTORNEYS FOR STATE: John A. Stride, Assist. DA, McKinney, Matthew Paul, St. Att., Austin.

JUDGES: WOMACK, J., delivered the opinion of the Court, in Part I of which all Members of the Court joined, and in Part II of which KELLER, P.J., and MEYERS, KEASLER, HERVEY, HOLCOMB, and COCHRAN, JJ., joined. PRICE, AND JOHNSON, JJ., dissent in Part II. KELLER, P.J., filed a concurring opinion in which KEASLER, HERVEY, and COCHRAN, JJ., joined. PRICE, J., filed a dissenting opinion. JOHNSON, J., filed a concurring and dissenting opinion.

OPINIONBY: WOMACK

OPINION:

This case comes before us again on remand from the Supreme Court of the United States. After we affirmed his conviction on September 15, 1999, the appellant petitioned the Supreme Court for a writ of certiorari. The question for review was, "Whether a defendant's race or ethnic background may ever be used as an aggravating circumstance in the punishment phase of a capital murder trial in which the State seeks the death penalty."[1] The Attorney General of Texas filed a response to the petition, in which he confessed that the prosecution's introduction of race as a factor for determining "future dangerousness" constituted a violation of the appellant's rights to equal protection and due process.[2] The Supreme Court granted the petition, summarily vacated our judgment, and remanded the case to us "for further consideration in light of the confession of error by the Solicitor General of Texas."[3]

I.

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[1] Pet. at 3.

[2] Response at 1.

[3] *530 U.S. 1212, 147 L. Ed. 2d 246, 120 S. Ct. 2214 (2000).* "Solicitor General" is a title recently given to an assistant attorney general. In the government of Texas there is no office of solicitor general that corresponds with the solicitor general of the United States, who is appointed by the president with the advice and consent of the senate, *see 28 U.S.C. § 505.*

At the threshold is a question of the attorney general's authority to confess error for the State in a certiorari proceeding in a criminal case before the Supreme Court. The question arises because no constitutional or statutory provision gives the attorney general authority to represent the State in such proceedings or, indeed, in any criminal proceeding. We directed the parties, and invited the Attorney General, to brief and argue the issue. They have done so.

A. *Constitutional and Statutory Authority of the County and District Attorneys*

The duty of criminal prosecution in the trial courts of record is on the county attorney and the district attorney (or criminal district attorney). In the courts of appeals the duty is on the same officers and on the state prosecuting attorney. In the court of criminal appeals, the duty is on the state prosecuting attorney, with the assistance of the county and district attorneys.

Every constitution of Texas, as a republic and as a state, has provided for district attorneys to represent Texas in criminal prosecutions. The office of district attorney has always been in the judicial department of government.[4] The office of county attorney was added to the judicial department in 1866 when the county court was created with jurisdiction of misdemeanor and petty offenses.[5] The

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[4] *See* REPUB. TEX. CONST. of 1836, art. IV, § 5; TEX. CONST. of 1845, art. IV, § 12; TEX. CONST. of 1861, art. IV, § 12; TEX. CONST. of 1866, art. IV, § 14; TEX. CONST. of 1869, art. V, § 12; TEX. CONST., art. V, § 21.

[5] *See* TEX. CONST. of 1866, art IV, § 15 (establishing county court in each county); *id.*, § 16 (fixing jurisdiction of court and authorizing

present Constitution gives the authority to prosecute criminal cases to the county attorneys, criminal district attorneys, and district attorneys, under the regulation of the legislature:

> A County Attorney, for counties in which there is not a resident Criminal District Attorney, shall be elected by the qualified voters of each county, who shall be commissioned by the Governor, and hold his office for the term of four years. In case of vacancy the Commissioners Court of the county shall have the power to appoint a County Attorney until the next general election. The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature.[6]

The legislature has regulated the duties of the district attorneys and county attorneys by giving only to them the authority to prosecute criminal cases, and by

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legislature to provide for county attorneys to represent the State and county in the court).

[6] TEX. CONST. art. V, § 21. There is yet a fourth prosecutorial office, the city attorney. "In the municipal court the city attorney has the right and duty to prosecute, and the county attorney has the right, but not a duty, to prosecute." *Aguirre v. State, 22 S.W.3d 463, 469 (Tex. Cr. App. 1999).* The authority of the city attorney is not material to this case.

giving them authority to represent the State in appeals.[7] Their authority to represent the State in appeals is limited only by a special statute that creates in the judicial department the office of state prosecuting attorney, which has primary authority to represent the State in this Court and authority to represent the State in the intermediate courts of appeal if the state prosecuting attorney considers it necessary.[8] District and county attorneys may assist the

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[7] "Each district attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom, except in cases where he has been, before his election, employed adversely. When any criminal proceeding is had before an examining court in his district or before a judge upon habeas corpus, and he is notified of the same, and is at the time within his district, he shall represent the State therein, unless prevented by other official duties." *TEX. CODE CRIM. PROC. art. 2.01.*

"The county attorney shall attend the terms of court in his county below the grade of district court, and shall represent the State in all criminal cases under examination or prosecution in said county; and in the absence of the district attorney he shall represent the State alone and, when requested, shall aid the district attorney in the prosecution of any case in behalf of the State in the district court. He shall represent the State in cases he has prosecuted which are appealed." *Id.*, art. 2.02.

In some particular counties the authority to prosecute felony and misdemeanor cases, and to represent the county in civil matters, are variously divided. *See generally* TEX. GOV'T CODE ch. 43 (district attorneys); *id.*, ch. 44 (criminal district attorneys), *id.*, ch. 45 (county attorneys).

[8] *See TEX. GOV'T CODE § 42.001(a)* ("The court of criminal appeals shall appoint a state prosecuting attorney to represent the state in all proceedings before the court. The state prosecuting attorney may also represent the state in any stage of a criminal case before a state court of appeals if he considers it necessary for the interest of the state"); *Ex parte Taylor, 36 S.W.3d 883, 887 (Tex. Cr. App. 2001)* ("the state prosecuting attorney [has] the primary authority in this court and an authority to intervene in the courts of appeals").

state prosecuting attorney in representing the State in this Court.[9] They have the primary authority to represent the State on appeal in other courts,[10] subject to the state prosecuting attorney's authority to intervene in a court of appeals.

This diffusion of the authority to prosecute is in keeping with the deliberately "fractured" nature of Texas government, in which the "framers of our constitution, influenced by the political philosophy of the Jacksonian era and the despotic control of the reconstruction governor, deliberately chose to decentralize executive authority."[11]

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[9] *See TEX. GOV'T CODE § 42.005(b)* ("A district or county attorney may assist the state prosecuting attorney in representing the state before the court of criminal appeals").

[10] *See TEX. CODE CRIM. PROC. art. 2.01* ("Each district attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom"); *id.*, art. 2.02 ("The county attorney ... shall represent the State in cases he has prosecuted which are appealed").

[11] *State v. Brabson, 976 S.W.2d 182, 186 (Tex. Cr. App. 1998)* (Womack, J., concurring), *adopted by the Court, Reynolds v. State, 4 S.W.3d 13, 15 (Tex. Cr. App. 1999).* "The constitution created seven officers in the executive department, only one of whom is appointed by the governor, the others being elected by popular vote. This in effect creates a separation of powers within the executive department itself.

"Administrative power is further decentralized by the creation of more than a hundred independent state agencies, practically all of which are headed either by elected executives or by part-time boards and commissions, that are independent of the governor and of each other. Even if the governor appoints the members of a commission (with the approval of the Senate which traditionally respects the rule of 'senatorial courtesy' which allows a nomination to be vetoed by the senator from the nominee's district), the members usually serve

> The State of Texas ... has given its authority to prosecute [criminal] cases to more than three hundred independently elected prosecutors, each of whom exercises authority in an area of the state no larger than a judicial district. This model differs from the federal model not only because there is no central prosecuting authority, but also because the prosecutors are officers of the judicial branch of government.[12]

The Constitution and laws, therefore, have deliberately and expressly given district attorneys and county attorneys general authority to represent the State in appeals of criminal cases.

B. *Constitutional and Statutory Authority of the Attorney General*

The attorneys general of most states have authority to prosecute criminal cases.

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overlapping terms that are longer than the governor's four-year term, which makes it difficult for the governor to achieve control of a majority. And it is a gross mistake to assume that even the commissions wield real powers in state agencies; the executive directors chosen by the commissions tend to be the dominant force in the agencies." *976 S.W.2d at 187* (citations and footnote omitted).

[12] *Brabson*, 976 S.W.2d at 187.

> The structure of the office and the duties of the attorney general vary from state to state and are defined in state constitutions, statutes, and court decisions in varying degrees of detail and emphasis. However, to the extent a common thread can be discerned, the duties have been summarized as follows: providing informal legal advice and formal legal opinions to the governor and other state officials and agencies and sometimes the legislature; representing the state, state agencies, and state officers in litigation; enforcing state civil and criminal law; and supervising local prosecutors in some states . . . . Although the duty is shared in a variety of ways with local government prosecutors, most state attorneys general have as one of their responsibilities the investigation and prosecution of state criminal offenses.[13]

The office of attorney general of Texas has never had authority to institute a criminal prosecution. Before 1876 it had constitutional authority to represent the State in appeals of criminal cases, and it had statutory authority to do so until 1923. Since then it has had no authority to

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[13] SCOT M. MATHESON, JR., *Constitutional Status and Role of the State Attorney General*, 6 J.L. & PUB. POL'Y 1, 3, 24 (1993).

represent the State in a criminal case in any court, except when a county or district attorney requests it to assist.

The Constitution of the Republic of Texas did not create an office of attorney general, although it did create the office of district attorney. The executive officers were a president,[14] a vice-president,[15] a secretary of state,[16] and "such other heads of executive departments as may be established by law."[17] The first act of the First Congress created four other executive offices, including that of attorney general.[18] The duties of these officers were described only in general terms.[19]

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[14] *See* REPUB. TEX. CONST. of 1836, art. III, § 1, *reprinted in* 3 VERNON'S CONSTITUTION OF THE STATE OF TEXAS ANNOTATED 482 (1993).

[15] *See id.*, art. IV, § 21.

[16] *See id.*, art. VI, § 10.

[17] *Ibid.*

[18] Act Authorizing the President of the Republic to Appoint His Cabinet Officers, approved October 25, 1836, 1 Laws of the Rep. of Tex., 1st Cong., 27, 27, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897 at 1087, 1087 (authorizing the president to appoint "a secretary each of the treasury, war, and navy departments; also, an attorney general").

[19] *See* Act Defining the Duties of the Heads of Departments of the Government, approved December 13, 1836, 1 Laws of the Rep. of Tex., 1st Cong., 77, 77, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897 at 1137, 1137 ("to reside permanently at the seat of government; to conform to and execute the instructions of the president, whether general or particular").

When Texas was admitted to the Union, the office of attorney general appeared in the judicial article of the state constitution of 1845, which said only that the duties of the district attorneys and the attorney general were to be prescribed by law.[20] The First Legislature gave the district attorney the duty "to conduct all prosecutions for crimes and offenses cognizable in [the district] court,"[21] and the attorney general the duty to "counsel and advise the several district attorneys ... whenever requested by them so to do."[22] These roles of the district attorneys and the attorney general in Texas were similar to those of the equivalent offices in the federal government at that time.

> Unlike the present day, when the Department of Justice in Washington, headed by the Attorney General, and employing hundreds of lawyers, maintains tight control over the work of the U.S. Attorneys, the situation in 1861 was quite different. There was then, of course, an Attorney General who sat in the President's Cabinet, but he did not head a government department; the Department of Justice would not be created until 1870. And until Congress acted in August 1861, the Attorney

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[20] *See* TEX. CONST. of 1845, art. IV, § 12; TEX. CONST. of 1866, art. IV, § 13.

[21] Act approved 13th May, 1846, 1st Leg., R.S., § 2, 1846 Tex. Gen. Laws 295, 296, *reprinted in* H.P.N. GAMMEL, 2 THE LAWS OF TEXAS 1822-1897, at 1601, 1602 (Austin, Gammell Book Co. 1898).

[22] Act approved 11th May, 1846, 1st Leg., R.S., § 3, 1846 Tex. Gen. Laws 206, 206, *reprinted in* H.P.N. GAMMEL, 2 THE LAWS OF TEXAS 1822-1897, at 1512, 1512 (Austin, Gammell Book Co. 1898).

> General had no authority to control the actions of the United States Attorneys in the various judicial districts. He could and did advise them on points of law or on government policy. But he gave advice, not direction.[23]

The first attorney general of Texas also was given the duty "to prosecute and defend all actions in the supreme court of the State, in which the State may be interested."[24] Under this division of authority the attorney general appeared in criminal cases before the state's only appellate court, the Supreme Court.[25] District attorneys appeared with the attorney general in criminal cases before the appellate court from time to time.

In the Reconstruction Constitution of 1869, the office of attorney general moved to the executive department. [26]

The Constitution of 1876, which still defines our government, kept the attorney general in the executive branch. The constitutional duties of the office are described thus:

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[23] WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 42 (1998).

[24] Act approved 11th May, 1846, *supra* note 20, § 1.

[25] See, e.g., Needham v. State, 1 Tex. 139, 140 (1847).

[26] *See* TEX. CONST. of 1869, art. IV, § 23.

> The Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law.

The same Constitution took away the Supreme Court's jurisdiction of criminal cases,[27] thereby eliminating

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[27] "The Supreme Court shall have appellate jurisdiction only, which shall be coextensive with the limits of the state; but shall only extend to civil cases of which the district courts have original or appellate jurisdiction." TEX. CONST. of 1876, art. V, § 3. Today, the Supreme Court's "appellate jurisdiction ... shall extend to all cases except in criminal law matters." TEX. CONST. art. V, § 3.

the specific constitutional authority of the attorney general to represent the State in appeals of criminal cases.

The Constitution gives the county attorneys and district attorneys authority to represent the State in criminal cases. It authorizes the legislature to give the attorney general duties which, presumably, could include criminal prosecution.

From 1876 to 1923, the attorney general had one, statewide responsibility in criminal cases: to represent the State in the Court of Appeals and its successor, the Court of Criminal Appeals. That responsibility was taken away by a legislative act in 1923 that created a special office to represent the State before the Court of Criminal Appeals.[28] According to the emergency clause of the act, the attorney general had assigned only one assistant to the court, and the docket of the court was so crowded that the assistant could not properly brief and argue the cases submitted to the court.

Since 1923 the legislature has not given the attorney general any duty to prosecute criminal cases at any level of the courts of Texas. The law gives the Attorney General of Texas no general authority to initiate a prosecution. "Under our state law, only county and district attorneys may represent the state in criminal prosecutions. The attorney general, on the other hand, has no criminal prosecution authority. Rather, he is generally limited to

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[28] Act of March 23, 1923, 38th Leg., R.S., ch. 156, 1923 Tex. Gen. Laws 335.

representing the State in civil litigation."[29] The authority of the attorney general is limited to assisting the district or county attorney, upon request.[30]

The limitation of the attorney general's authority to civil cases, while unusual in comparison to that of other attorneys general, mirrors limitations in the judicial department of Texas' government. The Supreme Court of

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[29] *State ex rel. Hill v. Pirtle, 887 S.W.2d 921, 930 (Tex. Cr. App. 1994)* (plurality op.) (citations omitted). "Nothing in the constitution or the laws of the state authorize prosecution of a criminal case in the trial courts of this state by the attorney general or, absent disqualification, by any person other than the duly elected district or county attorney. ... The legislature historically has seen fit not to grant such authority in the form of proposed constitutional amendments or legislation." *Id. at 932* (concurring op.).

[30] *See TEX. GOV'T CODE § 402.028*:

> *"Assistance to Prosecuting Attorneys*
>
> "(a) At the request of a district attorney, criminal district attorney, or county attorney, the attorney general may provide assistance in the prosecution of all manner of criminal cases, including participation by an assistant attorney general as an assistant prosecutor when so appointed by the district attorney, criminal district attorney, or county attorney.
>
> "(b) A district attorney, criminal district attorney, or county attorney may appoint and deputize an assistant attorney general as assistant prosecutor to provide assistance in the prosecution of criminal cases, including the performance of any duty imposed by law on the district attorney, criminal district attorney, or county attorney.
>
> "(c) Nothing in this section shall prohibit an assistant attorney general from appointment as attorney pro tem under the provisions of *Article 2.07, Code of Criminal Procedure.*"

Texas has had no jurisdiction of criminal cases since 1876, and Texas is one of only two states with a separate court of last resort for criminal cases. From 1891 until 1981, Texas also had intermediate courts of civil appeals--fourteen intermediate courts that, as the name implies, had jurisdiction only in civil cases. And in the state's most populous county, as well as in some others, county attorneys have authority to represent the State in civil cases only.[31]

C. *Tradition*

The attorney general claims authority to represent the State before the Supreme Court of the United States because of a long practice of doing so.[32] During most of the time in which this tradition developed, the Texas Constitution forbade the State from appealing in a criminal case.[33] In 1981 a district attorney sought to petition the Supreme Court of the United States for a writ of certiorari to review an adverse decision of this Court when the attorney general refused to do so. The defendant applied to us for a writ of prohibition on the ground that the Constitution forbade an appeal by the State. We decided that the constitutional prohibition of appeals by the State

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[31] "It is the primary duty of the county attorney ... to represent the state ... in all civil matters," in the state's most populous county, Harris. *TEX. GOV'T CODE § 45.201*. The same is true in the counties of Fort Bend, *id.* § 45.179, Grimes, *id.* § 45.193, Matagorda, *id.* § 45.261, Webb, *id.*, § 45.340, and Wharton, *id.* § 45.341, and in El Paso County, *id.* § 45.171(a), except that the county attorney retains authority in a few, particular kinds of criminal cases.

[32] Attorney General's Brief at 9.

[33] *See* TEX. CONST. art. V, § 26 (amended 1987) ("The State shall have no right of appeal in criminal cases").

applied only to appeals in the courts of this state, and it did not forbid the State to petition for writs of certiorari.[34] Since then district attorneys of this state have applied for, and been granted, writs of certiorari from the Supreme Court of the United States to review adverse decisions of this Court and the courts of appeals of Texas.[35] They have sought, and been denied, writs in other cases.[36] And they

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[34] *Faulder v. Hill*, 612 S.W.2d 512 (Tex. Cr. App. 1980).

[35] *See Texas v. Parrish, 510 U.S. 801, 126 L. Ed. 2d 11, 114 S. Ct. 41 (1993)* (District Attorney of Harris County); *Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989)* (Criminal District Attorney of Dallas County); *Texas v. Jackson, 475 U.S. 1114, 90 L. Ed. 2d 175, 106 S. Ct. 1627 (1986)* (Criminal District Attorney of Bexar County); *Texas v. McCullough, 475 U.S. 134, 89 L. Ed. 2d 104, 106 S. Ct. 976 (1986)* (Criminal District Attorney of Randall County); *Texas v. Brown, 460 U.S. 730, 75 L. Ed. 2d 502, 103 S. Ct. 1535 (1983)* (Criminal District Attorney of Tarrant County).

[36] *See Texas v. Consual*, 67 U.S.L.W. 3684, rev. denied, 526 U.S. 1160, 144 L. Ed. 2d 218, 119 S. Ct. 2051, 67 U.S.L.W. 3748 (U.S. Jun. 7, 1999) (No. 98-1770) (District Attorney of 34th Judicial District); *Texas v. Fernandez*, 67 U.S.L.W. 3259, 3305, rev. denied, 525 U.S. 1033, 142 L. Ed. 2d 479, 119 S. Ct. 576, 67 U.S.L.W. 3363 (U.S. Nov. 30, 1998) (No. 98-543) (Criminal District Attorney of Bexar County); *Texas v. Cook*, 66 U.S.L.W. 3029, 3089 rev. denied, 522 U.S. 821, 139 L. Ed. 2d 35, 118 S. Ct. 75, 67 U.S.L.W. 3255 (U.S. Oct. 6, 1997) (No. 96-2005) (Criminal District Attorney of Smith County); *Texas v. Mowbray*, 65 U.S.L.W. 3755, 3802 rev. denied, 521 U.S. 1120, 138 L. Ed. 2d 1016, 117 S. Ct. 2513, 65 U.S.L.W. 3861 (U.S. Jun. 27, 1997) (No. 96-1735) (Criminal District Attorney of Cameron County); *Texas v. Clark*, 65 U.S.L.W. 3444, 3492, rev. denied, 520 U.S. 1116, 65 U.S.L.W. 3629, 137 L. Ed. 2d 328, 117 S. Ct. 1246 (U.S. Mar. 3, 1997) (No. 96-959) (Criminal District Attorney of Tarrant County); *Texas v. Mitchell*, 62 U.S.L.W. 3157, rev. denied, 510 U.S. 864, 62 U.S.L.W. 3248, 126 L. Ed. 2d 142, 114 S. Ct. 183 (U.S. Oct. 4, 1993) (No. 93-103) (Criminal District Attorney of Smith County); *Texas v. McPherson*, 61 U.S.L.W. 3669, 61 U.S.L.W. 3778, rev. denied, 508 U.S. 939, 124 L. Ed. 2d 637, 113 S. Ct.

2414, 61 U.S.L.W. 3787 (U.S. May 24, 1993) (No. 92-1533) (Criminal District Attorney of Randall County); *Texas v. Wilkens*, 61 U.S.L.W. 3586, 61 U.S.L.W. 3655, rev. denied, 507 U.S. 1005, 61 U.S.L.W. 3667, 123 L. Ed. 2d 268, 113 S. Ct. 1646 (U.S. Mar. 29, 1993) (No. 92-1318) (Criminal District Attorney of Smith County); *Texas v. Rios*, 61 U.S.L.W. 3730, 61 U.S.L.W. 3721, rev. denied, 507 U.S. 1051, 61 U.S.L.W. 3731, 123 L. Ed. 2d 651, 113 S. Ct. 1946 (U.S. Apr. 26, 1993) (No. 92-1446) (Criminal District Attorney of Bexar County); *Texas v. Martinez*, 61 U.S.L.W. 3456, 61 U.S.L.W. 3549, rev. denied, 507 U.S. 972, 61 U.S.L.W. 3620, 122 L. Ed. 2d 785, 113 S. Ct. 1414 (U.S. Mar. 8, 1993) (No. 92-1051) (Criminal District Attorney of Tarrant County); *Texas v. Jiminez*, 61 U.S.L.W. 3155, 3207, rev. denied, 506 U.S. 917, 61 U.S.L.W. 3284, 121 L. Ed. 2d 246, 113 S. Ct. 327 (U.S. Oct. 13, 1992) (No. 92-301) (Criminal District Attorney of Midland County); *Texas v. Hill*, 61 U.S.L.W. 3083, 3200, rev. denied, 506 U.S. 905, 61 U.S.L.W. 3264, 121 L. Ed. 2d 221, 113 S. Ct. 297 (U.S. Oct. 5, 1992) (No. 92-198) (Criminal District Attorney of Dallas County); *Texas v. Corley*, 61 U.S.L.W. 3839, rev. denied, 509 U.S. 913, 61 U.S.L.W. 3853, 125 L. Ed. 2d 709, 113 S. Ct. 3020 (U.S. Jun. 21, 1993) (No. 92-1716) (Criminal District Attorney of Smith County); *Texas v. Walker*, 60 U.S.L.W. 3553, 3634, rev. denied, 503 U.S. 939, 60 U.S.L.W. 3652, 117 L. Ed. 2d 624, 112 S. Ct. 1481 (U.S. Mar. 23, 1992) (No. 91-1261) (Criminal District Attorney of Smith County); *Texas v. Cook*, 60 U.S.L.W. 3553, 3690, rev. denied, 60 U.S.L.W. 3717 (U.S. Apr. 20, 1992) (No. 91-1239) (Criminal District Attorney of Smith County); *Texas v. Skelton*, 59 U.S.L.W. 3066, 3203, rev. denied, 498 U.S. 878, 59 U.S.L.W. 3250, 112 L. Ed. 2d 170, 111 S. Ct. 210 (U.S. Oct. 1, 1990) (No. 90-139) (District Attorney of 70th Judicial District); *Texas v. Reeves*, 59 U.S.L.W. 3654, 3708, rev. denied, 499 U.S. 984, 59 U.S.L.W. 3725, 113 L. Ed. 2d 736, 111 S. Ct. 1641 (U.S. Apr. 22, 1991) (No. 90-1425) (Criminal District Attorney of Tarrant County); *Texas v. Cox*, 59 U.S.L.W. 3654, 3709, rev. denied, 500 U.S. 928, 59 U.S.L.W. 3770, 114 L. Ed. 2d 126, 111 S. Ct. 2042 (U.S. May 13, 1991) (No. 90-1444) (Criminal District Attorney of Tarrant County); *Texas v. Smith*, 58 U.S.L.W. 3154, 3244, rev. denied, 493 U.S. 1018, 107 L. Ed. 2d 736, 110 S. Ct. 716, 58 U.S.L.W. 3427 (U.S. Oct. 2, 1989) (No. 89-303) (District Attorney of Harris County); *Texas v. Chambers*, 58 U.S.L.W. 3491, 3533, rev. denied, 496 U.S. 912, 58 U.S.L.W. 3769, 110 L. Ed. 2d 282, 110 S. Ct. 2602 (U.S. Jun. 4, 1990) (No. 89-1170) (Criminal District Attorney of Dallas County); *Texas v. Brandley*, 59 U.S.L.W. 3016, 3069, rev. denied, 498 U.S. 817, 59 U.S.L.W. 3244, 112 L. Ed. 2d 35, 111 S. Ct. 61

have replied to applications from defendants in other cases. Yet it is certainly true that the attorney general traditionally has represented the State, most capably, in

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(U.S. Oct. 1, 1990) (No. 89-1887) (Criminal District Attorney of Montgomery County); *Texas v. Daniels*, 55 U.S.L.W. 3153, 3262, rev. denied, 479 U.S. 885, 55 U.S.L.W. 3258, 93 L. Ed. 2d 252, 107 S. Ct. 277 (U.S. Oct. 14, 1986) (No. 86-273) (District Attorney of Harris County); *Texas v. Adley*, 54 U.S.L.W. 3743, 3070, rev. denied, 479 U.S. 815, 93 L. Ed. 2d 26, 107 S. Ct. 68, 55 U.S.L.W. 3231 (U.S. Oct. 6, 1986) (No. 85-1759) (Criminal District Attorney of Dallas County); *Texas v. Wilkerson*, 56 U.S.L.W. 3030, 3078, rev. denied, 484 U.S. 826, 56 U.S.L.W. 3243, 98 L. Ed. 2d 54, 108 S. Ct. 93 (U.S. Oct. 15, 1987) (No. 86-1979) (District Attorney of Harris County); *Texas v. Long*, 56 U.S.L.W. 3463, 3534, rev. denied, 485 U.S. 993, 56 U.S.L.W. 3683, 99 L. Ed. 2d 511, 108 S. Ct. 1301 (U.S. Apr. 4, 1988) (No. 87-1032) (Criminal District Attorney of Dallas County); *Texas v. Crosby*, 56 U.S.L.W. 3720, 3773, rev. denied, 486 U.S. 1055, 56 U.S.L.W. 3848, 100 L. Ed. 2d 922, 108 S. Ct. 2821 (U.S. Jun. 13, 1988) (No. 87-1640) (Criminal District Attorney of Dallas County); *Texas v. Broadway*, 56 U.S.L.W. 3165, 3252, rev. denied, 484 U.S. 908, 56 U.S.L.W. 3269, 98 L. Ed. 2d 209, 108 S. Ct. 251 (U.S. Oct. 13, 1987) (No. 87-284) (Criminal District Attorney of Tarrant County); *Texas v. Van Guilder*, 54 U.S.L.W. 3664, 3747, rev. denied, 476 U.S. 1169, 54 U.S.L.W. 3809, 90 L. Ed. 2d 978, 106 S. Ct. 2891 (U.S. Jun. 9, 1986) (No. 85-1602) (Criminal District Attorney of Bexar County in personal capacity); *Texas v. Dunn*, 54 U.S.L.W. 3272, 3349, rev. denied, 475 U.S. 1089, 54 U.S.L.W. 3631, 89 L. Ed. 2d 732, 106 S. Ct. 1478 (U.S. Mar. 24, 1986) (No. 85-587) (District Attorney of Harris County); *Texas v. Chambers*, 53 U.S.L.W. 3854, 54 U.S.L.W. 3009, rev. denied, 54 U.S.L.W. 3227 (U.S. Oct. 7, 1985) (No. 84-1850) (Criminal District Attorney of Dallas County); *Texas v. Wilkerson*, 52 U.S.L.W. 3304, 3344, rev. denied, 470 U.S. 1008, 84 L. Ed. 2d 390, 105 S. Ct. 1371, 53 U.S.L.W. 3618 (U.S. Feb. 25, 1985) (No. 83-654) (District Attorney of Harris County); *Texas v. Samudio*, 51 U.S.L.W. 3792, 3846, rev. denied, 462 U.S. 1132, 77 L. Ed. 2d 1368, 103 S. Ct. 3113, 51 U.S.L.W. 3902 (U.S. Jun. 20, 1983) (No. 82-1726) (District Attorney of Harris County); *Texas v. Myers*, 50 U.S.L.W. 3200, 3383, rev. denied, 454 U.S. 1091, 70 L. Ed. 2d 630, 102 S. Ct. 656, 50 U.S.L.W. 3447 (U.S. Nov. 30, 1981) (No. 81-568) (Criminal District Attorney of Tarrant County).

the great majority of its criminal cases in the Supreme Court.

As we have said recently in another context, a long practice whereby two prosecuting officials could seek appellate review in a higher court cannot prevail over the proper construction of the law that grants authority to seek such review.[37] At the same time we held that the State has only one interest in a criminal case, and the State can be represented by only one attorney in making such decisions as whether to seek review and whether to confess error.[38] Only from a clear expression of law that gave two officials the duty and authority to represent the State simultaneously in certiorari proceedings in criminal cases in the Supreme Court of the United States would we construe the law of this state in such a way.

D. *Conclusion*

The language and the history of the constitutional and statutory provisions that create and regulate the attorney general, the district attorneys, and the county attorneys are clear. They expressly give district attorneys and county attorneys general authority to represent the State in appeals of criminal cases. They express no authority for the attorney general to represent the State in criminal cases without the request of a district or county attorney. The tradition of the attorney general's representation of the State on certiorari proceedings in

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[37] *See Ex parte Taylor*, 36 S.W.3d 883, 886 (Tex. Cr. App. 2001).

[38] *Id. at 887.*

criminal cases cannot provide authority that the law does not. The law gives only one answer to the question before us: The authority to represent the State in criminal cases in certiorari proceedings in the Supreme Court of the United States is in the district attorney or county attorney who had the authority to prosecute the case in the courts of Texas, and the attorney general is authorized to provide assistance to such an attorney at the request of that attorney or when such an attorney appoints an assistant attorney general as an assistant prosecutor or attorney pro tem under article 402.028 of the Government Code.

The tradition of the attorney general's representation of the State on certiorari proceedings in criminal cases can be helpful in understanding whether, in a particular case, the attorney general was assisting a county or district attorney at that attorney's request. As we understand the proceedings in this case, the District Attorney presumed that the Attorney General would represent the State in responding to the appellant's petition for certiorari. While the District Attorney did not expressly request such assistance, his silence in the face of a long practice whereby the attorney general has undertaken to respond to such petitions when the county or district attorney does not, should be construed as an implied request for such assistance in this case.[39] We therefore conclude that the representation of the State by the Attorney General in this case was authorized by law. We turn to the question of the effect of the confession of error.

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[39] After the Attorney General confessed error, the District Attorney sought, but was denied permission, to file a brief defending the judgment in the Supreme Court.

II.

A.

A confession of error by the prosecutor in a criminal case is important, but not conclusive, in deciding an appeal.

> The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed. The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as that of the enforcing officers. Furthermore, our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties.[40]

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[40] *Young v. United States*, 315 U.S. 257, 258-59, 86 L. Ed. 832, 62 S. Ct. 510 (1942) (citation omitted).

When presented with confessions of error, we have agreed frequently that the able prosecutors have correctly concluded that error was presented. But we have always done so after an independent examination of the merits of the claim of error.[41]

In this case the State has confessed in the Supreme Court the commission of an error that was not considered by us when the case was first submitted, because of our well-settled law that prevents appellate review of most claims that were not made in the trial court.

We begin our consideration of this confession of error by stating the facts. After the appellant was found guilty of capital murder, the parties presented the jury with evidence on the question of punishment.[42] One of the special issues for capital-sentencing juries is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat

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[41] *See, e.g., Saenz v. State, 842 S.W.2d 286 (Tex. Cr. App. 1992)* (when the court of appeals had affirmed a conviction after the State confessed error, Court of Criminal Appeals undertook independent examination of the claim before finding that there was error); *Davis v. State, 519 S.W.2d 874 (Tex. Cr. App. 1975)* (Court of Criminal Appeals agreed with State's confession that the appellant had been sentenced under the wrong statute, but went on to hold that the applicable statute was constitutionally defective); *Joe's Bonding Co. v. State, 481 S.W.2d 145 (Tex. Cr. App. 1972)* (Court of Criminal Appeals agreed with State's confession of error and independently sustained two other points of error). *See also Sauls v. State, 666 S.W.2d 186* (Tex. App. – Beaumont 1983, pet. ref'd) (court of appeals refused to reverse conviction when State confessed error).

[42] *See* TEX CODE CRIM. PROC. art. 37.071, § 2(a).

to society."[43] The State elicited testimony from Dr. Walter Quijano, a clinical psychologist, about statistical, "identifying markers" which help experts determine whether there is a probability that a defendant will present a future threat. One of the factors that, in his opinion, are associated with a defendant's future dangerousness was his race or ethnicity. Dr. Quijano testified that:

> "This is one of those unfortunate realities also that blacks and Hispanics are over-represented in the criminal justice system."
>
> *****
>
> "The race itself may not explain the over-representation, so there are other subrealities that may have to be considered. But, statistically speaking, 40 percent of inmates in the prison system are black, about 20 percent are - about 30 percent are white, and about 20 percent are Hispanics. So there's much over-representation."[44]

In response to the State's questioning, Dr. Quijano also stated that the appellant, an Argentinean, "would be considered a Hispanic."[45]

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[43] *Id.*, § 2(b)(1).

[44] 20 Reporter's Record at 75-76.

[45] *Id.* at 76.

The appellant did not object. He met the testimony through cross-examination, undermining Dr. Quijano's credibility and demonstrating that his definition of "Hispanic" was questionable. Furthermore, the appellant called his own expert witness, Dr. James McCabe, to testify concerning the appellant's future dangerousness. McCabe made clear that race is not a "causative" factor in recidivism:

> Q. [The appellant's counsel] Well, can you explain the difference to the jury between a correlational study and a study that might show us something about causation? What's the significance of that?
>
> A. [Dr. McCabe] Well, correlational studies -- and this is basically what -- the stage that he was showing -- they show a relationship between two items or two things, two behaviors, such as recidivism and a person's race for instance... And he said it is-- the relationship is that more minorities tend to recidivate. But that is not all that helpful. Now, you use a lot of different things that may be more helpful. But it doesn't cause- in other words, being black or Hispanic or whatever doesn't cause a person to go out and do some damage to other people. It doesn't cause at all.[46]

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[46] *Id.* at 187-88.

The appellant does not claim that his trial counsel was derelict in failing to object to Dr. Quijano's testimony.[47] To establish ineffective assistance of counsel, the appellant would have been required to prove, among other things, that his trial counsel's actions were not the result of "sound trial strategy."[48] As we have recently held, when a defense counsel presented to the jury evidence that "blacks and Hispanics are overrepresented in the ... so-called dangerous population," counsel's performance did not fall below an objective standard of reasonableness.[49]

Counsel might have been attempting, with Quijano's testimony, to do two things: (1) place before the jury all the factors it might use against appellant, either properly or improperly, in its assessment of his future dangerousness, and (2) persuade the jury that, despite all those negative factors, appellant would not be a future danger if imprisoned for life because the prison system's procedures and techniques would control or eliminate his tendency toward violence. Under the circumstances -- the State had already presented evidence before the jury that appellant had a long and violent criminal record -- we

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[47] *See Ex parte Saldano*, No. 41,313-01 (Tex. Cr. App. 1999), Application at p. 3 (presenting the claim that the appellant, as a foreign national, was denied prompt notice of his right of consular access in violation of Article 36 of the Vienna Convention on Consular Relations). We denied the appellant's application on May 5, 1999.

[48] *See Strickland v. Washington*, 466 U.S. 668, 690, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

[49] *Garcia v. State*, 57 S.W.3d 436 (Tex. Cr. App. 2001).

cannot say that counsel's conduct could not be considered sound trial strategy.[50]

That the appellant's method of handling the evidence was a strategy in this case is suggested by the separate application for habeas corpus that the appellant filed.[51] It contains no claim of ineffective assistance of counsel with respect to Dr. Quijano's testimony. This suggests that a hearing would demonstrate that his counsel chose not to object rather than neglecting to object.

B.

Assessing the effect of the State's confession of error in this case is made more difficult because the error that was confessed concerns a claim that has not been properly presented to, or decided by, this Court. The question that the appellant presented to the Supreme Court ("whether a defendant's race or ethnic background may ever be used as an aggravating circumstance in the punishment phase of a capital murder trial in which the State seeks the death penalty") is not one this Court considered in our earlier opinion. We held that the question was not before us because the appellant made no objection to the testimony of which he complained on appeal.

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[50] *Id.* at 440-41.

[51] *Ex parte Saldano, supra* note 47. Under our statutes, an application for a writ of habeas corpus from a person who has been sentenced to death must ordinarily be filed during the pendency of the appeal from the conviction. *See* TEX. CODE CR. PROC. *art.* 11.071, § 4(a).

Our rules require defendants to object at trial in order to preserve an error for review on appeal.[52] As to evidence in particular, our law is:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> *(1) Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if

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[52] "As a prerequisite to presenting a complaint on appellate review, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:

(A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint . . . and

(B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of . . . Appellate Procedure; and

(2) the trial court:

(A) ruled on the request, objection, or motion, either expressly or implicitly; or

(B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal." TEX. R. APP. PRO. 33.1(a).

the specific ground was not apparent from the context . . . [53]

Our law has always been thus.[54] The courts of every state and the courts of the United States have similar rules.[55]

We have previously recognized two general policies for requiring specific objections. "First, a specific objection is required to inform the trial judge of the basis of the objection and afford him the opportunity to rule on it. Second, a specific objection is required to afford opposing counsel an opportunity to remove the objection or supply other testimony,"[56] Stated more broadly, objections promote the prevention and correction of errors. When valid objections are timely made and sustained, the parties may have a lawful trial. They, and the judicial system, are not burdened by appeal and retrial. When a

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[53] TEX. R. EVID. 103(a).

[54] *See e.g., McCain v. State, 139 Tex. Cr. 539, 546, 141 S.W.2d 613, 617 (1940)* (op. on reh'g) (refusing to consider improper introduction of confession where defendant did not object at trial); *Rasberry v. State, 116 Tex. Cr. 288, 290, 31 S.W.2d 439, 440 (1930)* (op. on reh'g) (refusing to decide a challenge to the admissibility of testimony relating to illegal search because defendant did not object at trial); *Dreschel v. State, 39 S.W. 678 (Tex. Cr. App. 1897)* (refusing to consider claim of erroneous admission of evidence when appellant did not object at the time); *Hill v. Baylor, 23 Tex. 261, 263 (Tex. 1859)* ("It is scarcely necessary to say, that objections to the admissibility of evidence not taken below, and which, if taken, might have been obviated at the trial, cannot be first urged in this court, as a ground for reversing the judgment").

[55] *See* FED. R. CRIM. PRO. 51; FED. R. EVID. 103(a).

[56] *Zillender v. State*, 557 S.W.2d 515, 516 (Tex. Cr. App. 1977).

party is excused from the requirement of objecting, the results are the opposite.

For these reasons we have said, "All but the most fundamental rights are thought to be forfeited if not insisted upon by the party to whom they belong. Many constitutional rights fall into this category. When we say 'that even constitutional guarantees can be waived by failure to object properly at trial,' we mean that some, not all, constitutional rights may be forfeited."[57]

The courts of every jurisdiction in this country have some doctrine that permits appellate courts to consider claims that such fundamental rights were violated without objection.[58] In the criminal law of this state, such errors are called "fundamental."

One such class of fundamental errors has been recognized by the legislature. A statute permits our appellate courts to consider claims that an error in the court's charge to the jury, to which no objection was made, was so grave as to deny a defendant a fair trial.[59]

Before 1993 this Court had recognized more than a dozen other kinds of fundamental error. This jurisprudence "reflects piecemeal developments that each have somewhat different rationales. The overall situation, then, simply cannot be explained by reference to any

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[57] *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Cr. App. 1993) (quoting *Gibson v. State*, 516 S.W.2d 406, 409 (Tex. Cr. App. 1974)).

[58] *See, e.g.*, FED. R. CRIM. PRO. 52(b).

[59] *See* TEX. CODE CR. PROC. art. 36.19; *Almanza v. State*, 686 S.W.2d 157 (Tex. Cr. App. 1984).

unifying principle or principles. *Marin v. State* suggests both the need to reconsider this case law and a framework for that reconsideration."[60]

In *Marin v. State,* we said that the rules that require a timely and specific objection, motion, or complaint do not apply to two relatively small categories of errors: violations of "rights which are waivable only" and denials of "absolute systemic requirements."[61] Such errors may be raised for the first time on appeal.[62]

Examples of rights that are waivable-only include the rights to the assistance of counsel and the right to trial by jury.[63] The issue in *Marin* was "whether the failure of the trial judge to allow appointed counsel ten days of trial preparation in violation of *article 1.051(e), Texas Code of Criminal Procedure,* may be raised for the first time on appeal."[64] We found that the right protected by this statute was waivable-only because the Legislature said so:

> . . . the Court of Appeals rightly determined that article 1.051(e) is waivable only, inasmuch as the Legislature said so expressly by providing that appointed counsel "may waive the [10 days of] preparation time with the consent of the defendant in

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[60] GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE – CRIMINAL PRACTICE AND PROCEDURE § 42.121 (1995).

[61] *Marin,* 851 S.W.2d at 280.

[62] *Ibid.*

[63] *Ibid.*

[64] *Id. at* 277.

> writing or on the record in open court." We agree with the lower court that this language clearly does not contemplate a forfeiture of the statutory right from a mere failure to object at trial.[65]

Absolute, systemic requirements were said to include jurisdiction of the person, jurisdiction of the subject matter, and a penal statute's being in compliance with the Separation of Powers Section of the state constitution.[66]

Marin has been a watershed decision in the law of error-preservation. After *Marin* we have held that a right that formerly was thought to be "waivable only" actually requires an objection at trial.[67] We have held that some requirements that were formerly held to be absolute requirements are not.[68] We have held that a party may be estopped from relying on an absolute requirement.[69] On

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[65] *Id. at 280.*

[66] *Id.* at 279.

[67] *See Gonzalez v. State, 8 S.W.3d 640 (Tex. Cr. App. 2000)* (claim of multiple punishments in violation of Fifth Amendment's Jeopardy Clause, which was based on court's charge that allowed a general verdict to be returned on alternative theories of offense).

[68] *See Hatch v. State, 958 S.W.2d 813 (Tex. Cr. App. 1997)* (statutory requirement of verdict by twelve jurors); *Ex parte McJunkins, 954 S.W.2d 39 (Tex. Cr. App. 1997)* (statutory requirement of concurrent sentencing for offenses tried in a single criminal action).

[69] See *Prystash v. State,* 3 S.W.3d 522 (Tex. Cr. App. 1999) (statutory requirement of jury charge), cert. denied, 529 U.S. 1102, 146 L. Ed. 2d

the other hand, we have recognized three more absolute requirements since *Marin*: a constitutional requirement that a district court must conduct its proceedings at the county seat,[70] the constitutional prohibition of ex post facto laws,[71] and certain constitutional restraints on the comments of a judge.[72]

In the *Marin* framework, the question in this case is whether the introduction of the evidence in question was one to which the appellant was required to have made a timely, specific objection at trial. He was required to object unless his right to avoid this type of evidence is a right that is either waivable-only or an absolute, systemic requirement.

That the State refrain from introducing evidence that violates the defendant's rights under the Equal Protection Clause is neither an absolute, systemic requirement nor a right that is waivable only. We have consistently held that the failure to object in a timely and

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782, 120 S. Ct. 1840 (2000); *State v. Yount*, 853 S.W.2d 6 (Tex. Cr. App. 1993) (statute of limitation).

[70] *See Stine v. State, 908 S.W.2d 429 (Tex. Cr. App. 1995).* The Court could not agree on a basis for this holding. Three judges held the requirement was jurisdictional, *see id. at 430* (opinion of Overstreet, J.); one judge held the requirement was "systemic" but not jurisdictional, *see id. at 433* (opinion of Meyers, J.); a fifth judge joined the judgment without opinion, *see ibid.* (Maloney, J.).

[71] *See Ieppert v. State*, 908 S.W.2d 217 (Tex. Cr. App. 1995).

[72] *See Blue v. State, 41 S.W.3d 129 (Tex. Cr. App. 2000).* The Court could not agree on the basis of this requirement. Four judges held that the judge's comments tainted the presumption of innocence and were fundamental error of constitutional dimension, *see id. at 129* (opinion of Johnson, J.); a fifth judge held that the judge's comments violated the right to an impartial judge, *see id. at 135* (opinion of Keasler, J.).

specific manner during trial forfeits complaints about the admissibility of evidence.[73] This is true even though the error may concern a constitutional right of the defendant.[74] Specifically, a defendant's failure to object to testimony prevents his raising on appeal a claim that the testimony

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[73] *See Crocker v. State, 573 S.W.2d 190, 201 (Tex. Cr. App. 1978)* (improper bolstering). *See also Goodman v. State, 701 S.W.2d 850, 864 (Tex. Cr. App. 1985)* (inadmissible hearsay); *Fancher v. State, 659 S.W.2d 836, 839 (Tex. Cr. App. 1983)* (inadmissible confession); *Russell v. State, 665 S.W.2d 771, 777-78 (Tex. Cr. App. 1983)* (opinion testimony), *cert. denied, 465 U.S. 1073, 79 L. Ed. 2d 752, 104 S. Ct. 1428 (1984); Shannon v. State, 567 S.W.2d 510 (Tex. Cr. App. 1978)* (testimony regarding irrelevant extraneous offense); *Granviel v. State, 552 S.W.2d 107, 118 (Tex. Cr. App. 1976)* (expert testimony) *cert. denied, 431 U.S. 933, 53 L. Ed. 2d 250, 97 S. Ct. 2642 (1977); Bouchillon v. State, 540 S.W.2d 319, 322 (Tex. Cr. App. 1976)* (inadmissible hearsay); *Hinkle v. State, 442 S.W.2d 728, 734 (Tex. Cr. App. 1971)* (inadmissible photograph).

[74] *See Gauldin v. State, 683 S.W.2d 411, 413 (Tex. Cr. App. 1984), overruled on other grounds, Guzman v. State, 959 S.W.2d 631, 634 (Tex. Cr. App. 1998)* (statements obtained in violation of *Miranda*); *Mendoza v. State, 552 S.W.2d 444, 450 (Tex. Cr. App. 1977)* (trial court did not commit fundamental error by allowing testimony that denied defendant federally guaranteed constitutional rights; defendant was required to object to preserve this error); *Boulware v. State, 542 S.W.2d 677, 682-83 (Tex. Cr. App. 1976)* (*Witherspoon* error), *cert. denied, 430 U.S. 959, 51 L. Ed. 2d 811, 97 S. Ct. 1610 (1977); Gibson v. State, 516 S.W.2d 406, 409 (Tex. Cr. App. 1974)* (admissibility of post-arrest silence); *Ex parte Bagley, 509 S.W.2d 332, 333-34 (Tex. Cr. App. 1974)* (admissibility of confession obtained in violation of *Miranda*); *Salas v. State, 486 S.W.2d 956, 957 (Tex. Cr. App. 1972)* (admissibility of officer's testimony about a statement obtained as result of illegal search); *Valdez v. State, 472 S.W.2d 754, 756 (Tex. Cr. App. 1971)* (admissibility of evidence obtained as result of illegal search).

was offered for the sole purpose of appealing to the potential racial prejudices of the jury. [75]

Because the appellant did not object to the admission of the testimony of which he now complains, the question he seeks to present has not been preserved for review on appeal.

C.

If the State's confession of error in the Supreme Court implicates any federal-law claim, it must be that the Fourteenth Amendment requires this Court to hold that the admission of Dr. Quijano's evidence is a reversible error. No such claim has been presented to us, much less decided by us.

The Attorney General and other *amici curiae* say that the Supreme Court's action in granting review is a binding determination that the appellant's Fourteenth Amendment claim has been decided by this Court. *Amici* attach too much significance to the Supreme Court's decision to grant the petition, summarily vacate our judgment, and remand the case to us "for further consideration in light of the confession of error by the Solicitor General of Texas."[76]

The Supreme Court has, of course, not only jurisdiction to determine its jurisdiction, but also a duty to determine for itself precisely the ground on a which a state

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[75] *Brooks v. State, 990 S.W.2d 278, 286* (Tex. Cr. App.), *cert. denied, 528 U.S. 956, 145 L. Ed. 2d 300, 120 S. Ct. 384 (1999).*

[76] *Saldano v. Texas,* 530 U.S.1212, 147 L. Ed. 2d 246, 120 S. Ct. 2214 (2000).

court's judgment rests.[77] Here the Supreme Court was presented, on the one hand, with the opinion of this Court that decided the case on state-law grounds and, on the other, a petition for certiorari that presented a federal question and a response that admitted there had been a federal error. It is not surprising that the Supreme Court should exercise its jurisdiction to have the case clarified before making a final decision as to its jurisdiction.

D.

If the State's confession of error be construed as a confession that the Fourteenth Amendment requires reversal of a conviction because of the introduction of Dr. Quijano's testimony, without objection, we cannot agree. The appellant has not demonstrated how his constitutional claim is different from the ones we have held forfeited in the past, except by directing our attention to *Zant v. Stephens*.[78] The appellant cites *Zant* for the proposition that a death sentence must be set aside if an aggravating factor is attached to factors that are constitutionally impermissible or totally irrelevant to the sentencing process. He relies on this passage from *Zant*:

> Respondent contends that the death sentence was impaired because the judge instructed the jury with regard to an invalid statutory aggravating circumstance, a "substantial history of serious assaultive criminal convictions,"

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[77] *See Black v. Cutter Laboratories*, 351 U.S. 292, 298, 100 L. Ed. 1188, 76 S. Ct. 824 (1956).

[78] 462 U.S. 862, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983).

> for these instructions may have affected the jury's deliberations. In analyzing this contention it is essential to keep in mind the sense in which that aggravating circumstance is "invalid." It is not invalid because . . . Georgia attached the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant, *cf. Herndon v. Lowry, 301 U.S. 242, 81 L. Ed. 1066, 57 S. Ct. 732 (1937)* . . . If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside.[79]

This *obiter dictum* is of little help to the appellant, for examination of the authority there cited demonstrates that the requirement of objection applies to such a case.

The question in *Herndon v. Lowry* was whether the statute under which Herndon was convicted for attempting to incite insurrection was so vague as applied to him as to violate the constitutional guaranties of freedom of speech and assembly embodied in the Fourteenth Amendment.[80] He first tried to raise this claim

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[79] *Zant*, 462 U.S. at 885.

[80] *See Herndon*, 301 U.S. at 264.

in the Supreme Court on appeal from his conviction, but the Court held it had no jurisdiction of such a federal claim since the state court's judgment was based on his failure to preserve the question by specific and timely exceptions and assignments of error.[81] Only when the state courts agreed to consider the federal grounds in habeas corpus proceedings was Herndon able to seek further review.[82] Far from supporting the appellant's contention that equal-protection claims are excepted from the requirement to object, the Supreme Court's decisions hold the opposite.

E.

We conclude that the State's confession of error in the Supreme Court is contrary to our state's procedural law for presenting a claim on appeal, as well as the Supreme Court's enforcement of such procedural law when it is presented with equal-protection claims. If any decision of any court in this country would support another conclusion, the appellant, the Attorney General and other *amici*, and the dissenting opinion have not informed us of it.

After our independent examination of the claim, we hold that no complaint about Dr. Quijano's testimony is presented for appellate review because the appellant did not make an objection to the testimony as our law has

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[81] *See Herndon v. Georgia, 295 U.S. 441, 442-43, 79 L. Ed. 1530, 55 S. Ct. 794 (1935).*

[82] *See Herndon v. Lowry, 301 U.S. 242, 247, 81 L. Ed. 1066, 57 S. Ct. 732 (1937)* ("The scope of a habeas corpus proceeding in the circumstances disclosed is a state and not a federal question and since the state courts treated the proceeding as properly raising issues of federal constitutional right, we have jurisdiction and all such issues are open here").

always required. Under that law a decision on the admissibility of evidence that there is a correlation between ethnicity and recidivism cannot be reached, and we express no view on that issue.

The judgment of the trial court is affirmed.

En banc.

CONCURBY: KELLER; JOHNSON (In Part)
CONCUR:

KELLER, P.J., filed a concurring opinion in which KEASLER, HERVEY, and COCHRAN, JJ., joined.

CONCURRING OPINION

The dissenting opinions do a disservice to counsel for appellant, who put forward and ably argued a proposed legal basis for granting relief. The Court's opinion addresses appellant's arguments and explains why they must fail. The dissenters, on the other hand, offer no attempt to defend appellant's actual legal position (or to rebut the Court's rejection of that position), preferring instead to rely upon the persuasive power of catchy phrases. It appears that the dissenters find appellant's legal theory indefensible - their only argument is that it "ought to be" the law.[1]

I join the Court's opinion.

KELLER, P.J.

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[1] *Saldano v. State*, 70 S.W.3d 873 (Tex.Crim.App. delivered March 13, 2002)(Price, J., dissenting).

FILED: March 13, 2002

DISSENTBY: PRICE; JOHNSON (In Part)

DISSENT:

PRICE, J., ***filed a dissenting opinion.***

A sentencing jury may not consider a defendant's race when deciding whether to impose the death penalty. During the punishment phase of the appellant's capital murder trial, evidence admitted made a correlation between future dangerousness and the incarceration rates of Hispanics. Because the only relevant inference to be drawn from such evidence is an improper one, I would reverse the appellant's death sentence. Therefore, I dissent.

The majority begins by discussing the Attorney General's authority to represent the State and to confess error in proceedings before the United States Supreme Court.[1] I think we need not address these issues. Dr.

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[1] It may be unnecessary to address these issues in light of our decision in *Mitchell v. State, 2002 Tex. Crim. App. LEXIS 18,* No. 1485-00 (Tex. Crim. App. Jan. 30, 2002). In *Mitchell,* we did not address the merits of a point the State had conceded in an earlier proceeding. We explained:

> The State argues that the court of appeals erred by holding that the appellant's trial counsel was deficient because the record does not show that his action was not a tactical decision. The State is foreclosed from raising that argument at this stage of the process. In its petition for discretionary review of the first decision of the Court of Appeals, the State conceded counsel's performance was deficient. . . . It is too late for the

Quijano's testimony during the punishment phase of the appellant's trial drew a correlation between the appellant's race and incarceration rates. I would hold that the admission of this evidence was fundamental error, which should be reviewed even in the absence of a trial objection.

The *only* relevant inference to be drawn by the jury from the evidence at issue was an impermissible one Hispanics are dangerous because they are over represented in the prison population. The appellant is Hispanic. Therefore, the jury could have concluded, the appellant constitutes a future danger.

The analogy of a skunk in the jury box is instructive. Racial prejudice can sneak into the jury box while making the jury's verdict on punishment seem legitimate.

State to reverse its decision on the deficiency-of-performance part of the *Strickland* standard.

2002 Tex. Crim. App. LEXIS 18 at 4. Having relied on the Attorney General to respond on its behalf before the Supreme Court, the State should not be heard now to complain of the Attorney General's confession of error. The same complaint from a criminal defendant whose lawyer conceded error in a prior proceeding, certainly, would not be heard by this Court.

When this case was before us on direct appeal, we reviewed the error under then Texas Rule of Criminal Evidence 103(d) after noting that the appellant did not object to the admission of the evidence at trial. *Saldano v. State*, No. 72,556 slip op. at 10 (Tex. Crim. App. Sept. 15, 1999) (not designated for publication) ("The appellant urges this Court to consider his complaint under Rule of Criminal Evidence 103(d) as fundamental error. We cannot say that the admission of Dr. Quijano's testimony of which the appellant complains was fundamental error."). The Attorney General conceded error in response to the appellant's petition for certiorari to the United States Supreme Court.

By design, the decision that a capital sentencing jury makes is a "highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'" *Caldwell v. Mississippi, 472 U.S. 320, 340 n.7, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985)* (quoting *Zant v. Stephens, 462 U.S. 862, 900, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983)* (Rehnquist, J., concurring)). This range of discretion creates "a unique opportunity for racial prejudice to operate but remain undetected." *Turner v. Murray, 476 U.S. 28, 35, 90 L. Ed. 2d 27, 106 S. Ct. 1683 (1986)* (White, J., joined by Blackmun, Stevens, and O'Connor, J.J.). We need to guard jealously the sentencing phase of a capital trial to keep prejudice from ruining the process.

It is our job to be sure that racial prejudice is not, *in any way*, a component of the jury's decision to impose the death penalty. Texas Rule of Evidence 103(d) provides a vehicle by which we can review fundamental error. In *Marin v. State, 851 S.W.2d 275 (Tex. Crim. App. 1993)*, we explained that, in our system, three kinds of rules exist: "(1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request." *Id. at 279.* If the right to a capital sentencing proceeding without the taint of racial prejudice is not a right that requires, *at least*, an affirmative waiver, *it ought to be.*

That the State did not emphasize this unfairly prejudicial evidence in its closing arguments does not affect the analysis. A skunk whether hurled or merely tossed into the jury box still fouls the air.

That there may have been ample evidence supporting a finding of future dangerousness and that

there were factors other than race included in Dr. Quijano's testimony are of no moment. If a skunk is allowed into the jury box, nothing will remove its stench.

I cannot condone a decision to impose the death penalty when I am uncertain whether racial prejudice was a component of that decision. I dissent.

JOHNSON J., *filed a concurring and dissenting opinion.*

CONCURRING AND DISSENTING OPINION

I join the opinion of the Court as to Part I. I respectfully dissent as to Part II. I do not think that race or ethnicity should ever be a consideration, in any degree, in the assessment of punishment. It is beyond settled that using race or ethnicity as a basis for finding guilt is constitutionally barred. U.S. Const. Amend. XIV, § 1; Tex. Const. Art. I, § 3a. Neither is such a use permissible in determining an appropriate punishment. *Baldwin v. Alabama, 472 U.S. 372, 382, 105 S. Ct. 2727, 2733, 86 L. Ed. 2d 300, 309 (1985); Zant v. Stephens, 462 U.S. 862, 885, 103 S. Ct. 2733, 2747, 77 L. Ed. 2d 235, 255 (1983).* It is impossible to determine to what extent an assertion of race or ethnicity as an indicator of criminality or future dangerousness influences the deliberations of a given jury. Neither can we gauge the effect on the jury of the cross-examination of the original witness or the effect of any defense expert called to rebut such use of race or ethnicity. In one case, an instruction to the jury to disregard such testimony may be sufficient, in another case it may not. We can identify neither the cases in which such an instruction cures any

error nor the cases in which the instruction serves to emphasize and exacerbate the error.

Allowing the kind of testimony complained of here violates one of the most fundamental principles of our legal system: a citizen must be found guilty and given appropriate punishment because of what he did, not who he is. It is even more important to stoutly defend that principle when the potential consequence of a violation is as severe as it is here. To do less is to put a cloud over the state's right to execute this appellant. I would remand for a new punishment hearing.

Johnson, J.

Date filed: March 13, 2002